No. 83-435

IN THE

Supreme Court of the United States

October Term, 1983

THE WICHITA BOARD OF TRADE, ET AL.,
Petitioners,

v.

THE UNITED STATES OF AMERICA AND
THE INTERSTATE COMMERCE COMMISSION, ET. AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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September, 1983

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QUESTIONS PRESENTED

1. Where this Court directed a district court to resolve the disposition of a fund, consisting of payments by shippers of unlawful grain inspection charges collected by railroads during the period covered by a stay order issued by this Court, and the district court remanded the issue of reasonableness of those charges to the Interstate Commerce Commission, did that court lose the power to comply with this Court's directive by failing to state in its remand that it reserved jurisdiction over the ultimate disposition of the fund?

2. Where, pursuant to a stay order issued by this Court, a fund, consisting of payments by shippers for unlawful grain inspection charges, was accumulated under the jurisdiction of a district court, did the district court act properly in ordering the fund returned to those who bore the unlawful charges?

3. (a) When this Court has referred to a district court for decision an issue that was not briefed or argued before this Court, it is the district court's duty to decide that issue by applying established legal and equitable principles or to try, by parsing the opinion of the Court, to decide how this Court would have decided the issue if it had decided it?

(b) Where the district court has decided the issue applying established legal and equitable principles, may a court of appeals ignore the merits of the district court's decision and reverse, based on its interpretation of this court's opinion?

4. Where: (1) the charges collected by the railroads while an appeal was pending in this court are in a fund under the supervision of a district court; (2) the Interstate Commerce Commission subsequently found that the charges collected by the railroads were unlawful; and (3) the statute confers on shippers an unqualified right to recover the damages sustained by unlawful action of the railroads, must the district court nevertheless relegate the shippers who paid the unlawful charges to complaint proceedings before the Commission?

5. After a three-judge court has completed its review of a Commission decision, is the disposition of a fund accumulated as an incident to such review a matter that can be determined by a single judge?

LIST OF PARTIES

This Petition is being filed on behalf of the following: The Wichita Board of Trade, the Board of Trade of Kansas City, Mo., Board of Trade of the City of Chicago, Omaha Grain Exchange, Enid Board of Trade, the Hutchison Board of Trade, Sioux City Grain Exhange, Merchants' Exchange of St. Louis, the Denver Grain Exchange Association, Los Angeles Grain Exchange, Fort Worth Grain Exchange, Peoria Board of Trade, Utah-Idaho Grain Exchange, State Corporation Commission of the State of Kansas, Missouri Department of Agriculture, Kansas Grain & Feed Dealers Association, National Grain Trade Council, National Grain and Feed Association, Missouri Farmers Association, Inc., Cash Grain Association of the Chicago Board of Trade, Pacific Northwest Grain Dealers Association, Inc., National Association of Wheat Growers, Kansas City Grain Commission Men's Association, California Grain and Feed Association, Far-Mar-Co., Inc., FS Services, Inc., Producers Grain Corporation, Bunge Corporation, C-G-F-Grain Company, Inc. Garvey Elevators, Inc. Garvey Grain, Inc., Lincoln Grain, Inc., Midwestern Grain Company - Division of Garnac Grain Co, Inc., Masters Grain Company, Hollander & Feuerhaken, Mohr-Holstein Commission Co., and Stotler & Company.[1]

The following list identifies parties to the proceeding in the Court of appeals for the Tenth Circuit:

The Wichita Board of Trade

The Board of Trade of Kansas City, MO

Board of Trade of the City of Chicago

Omaha Grain Exchange

Enid Board of Trade

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[1]Lauhoff Grain Company is a subsidiary of the Bunge Corporation, which is a subsidiary of Los Andes N V. C-G-F Grain Company, Inc. is a subsidiary of Mid-West Industries. Lincoln Grain, Inc. is subsidiary of Lincoln Industries, Inc.

The Hutchison Board of Trade
Sioux City Grain Exchange
Merchants' Exchange of St. Louis
The Denver Grain Exchange Association
Los Angeles Grain Exchange
Fort Worth Grain Exchange
Peoria Board of Trade
Utah-Idaho Grain Exchange
State Corporation Commission of the State of Kansas
Missouri Department of Agriculture
Kansas Grain & Feed Dealers Association
National Grain Trade Council
National Grain and Feed Association
Missouri Farmers Association, Inc.
Cash Grain Association of the Chicago Board of Trade
Pacific Northwest Grain Dealers Association, Inc.
National Association of Wheat Growers
Kansas City Grain Commission Men's Association
California Grain and Feed Association
Far-Mar-Co., Inc.
FS Services, Inc.
Producers Grain Corporation
Bunge Corporation
CGF Grain Company, Inc.
Garvey Elevators, Inc.
Garvey Grain, Inc.
Lincoln Grain, Inc.
Midwestern Grain Company - Division of Garnac Grain Co., Inc.

Masters Grain Company
Hollander & Feuerhaken
Mohr-Holstein Commission Co.
Stotler & Company

United States of America
Interstate Commerce Commission

The Atchison, Topeka and Santa Fe Railway Company
The Baltimore and Ohio Railroad Company
The Baltimore and Ohio Chicago Terminal Railroad Company
Burlington Northern Inc.
The Chesapeake and Ohio Railway Company
Chicago and Eastern Illinois Railroad Company
Chicago and North Western Railway Company
Chicago, Rock Island, and Pacific Railroad Company
Colorado and Southern Railway Company
The Denver and Rio Grande Western Railroad Company
Elgin, Joliet and Eastern Railway Company
Erie Lackawanna Railway Company
Fort Dodge, Des Moines & Southern Railway Company
Fort Worth and Denver Railway Company
Grand Trunk Western Railroad Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company
Illinois Central Gulf Railroad Company
Illinois Terminal Railroad Company
Kansas City Southern Railway Company

Louisville and Nashville Railroad Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company
Monon Railroad Company
Norfolk and Western Railway Company
Penn Central Transportation Company
St. Louis-San Francisco Railway Company
St. Louis Southwestern Railway Company
Soo Line Railroad Company
Southern Pacific Transportation Company
Texas and Pacific Railway Company
Toledo, Peoria & Western Railroad Company
Union Pacific Railroad Company
Western Pacific Railroad Company

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THE INTERSTATE COMMERCE COMMISSION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, the Wichita Board of Trade, et al., respectfully pray that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is reported at 706 F. 2d. 1067 (10th Cir. 1983) and is included as Appendix (i). The decision of the United States District Court for the District of Kansas, which the court of appeals reversed, is unreported and is included as Appendix (ii) (a). The earlier decision of the district court is reported at 352 F. Supp. 365 (D. Kan. 1972) and is included as Appendix (ii) (b). The

earlier decision of this Court is reported as *Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade*, 412 U.S. 800 (1973) and is included as Appendix (ii)(c). The stay order of this Court, pursuant to which the district court awarded the refunds here in issue, is reported as *Atchison, Topeka & Santa Fe Rairoad v. Wichita Board of Trade*, 409 U.S. 801 (1972) and is included as Appendix (ii)(d). The decisions of the Interstate Commerce Commission are reported as *Inspection in Transit, Grain and Grain Products*, 339 I.C.C. 364 (1971); *Inspection in Transit, Grain and Grain Products*, 349 I.C.C. 89 (1975); and *Inspection in Transit, Grain and Grain Products*, 359 I.C.C. 624 (1979), and are included as Appendices (ii)(e), (f) and (g), respectively. The order of this Court of June 26, 1977 is reported as *Atchison, Topeka and Santa Fe Railway v. Wichita Board of Trade*, 433 U.S. 902 (1977) and is included as Appendix (ii)(h).[2]

JURISDICTION

The Opinion and Judgment of the court of appeals was entered on April 28, 1983. A timely Petition for Rehearing was denied by order entered June 16, 1983, which appears as Appendix (iii) hereto. This Court has jurisdiction to review the decision of the court below under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case was decided under the provisions of the Interstate Commerce Act, 49 U.S.C. §1 *et seq.*, in effect prior to its recodification as 49 U.S.C. §10101 *et seq* (Pub. L. No. 95-473, 92 Stat. 1337). The relevant portions of the following statutory provisions are set out as Appendix (iv)(c):

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[2]Also included (in Appendix (iv)) are the Nov. 12, 1975 decisions of the Commission in *Inspection in Transit, Grain and Grain Products*, I.C.C. Docket No. 8548, which denied a motion of the Secretary of Agriculture for refunds under Section 15(7) of the Interstate Commerce Act (App. (iv)(a)), and the decision of the Court of Appeals for the District of Columbia Circuit reviewing that decision which is reported as *Secretary of Agriculture v. I.C.C.*, 551 F.2d 1329 (D.C. Cir. 1977) (App. (iv)(b)).

Former Section 1 (5)

Former Section 8

49 U.S.C. §11705 (b) (2)

Former Section 9

49 U.S.C. §11705 (c) (1)

Former Section 13 (1)

Former Section 15 (7)

Former Section 16 (1)

STATEMENT

Petitioners initially sought review before the three-judge district court of the April 16, 1971 decision of the Interstate Commerce Commission (Commission) in *Inspection in Transit, Grain and Grain Products,* 339 I.C.C. 364 (1971) (App. (ii) (e)), which found just and reasonable a separate charge proposed by the railroads for in-transit grain inspection, without any offsetting reduction in the line-haul rate.[3] The district court acquired jurisdiction under the then effective provisions of 28 U.S.C. §§1336 and 2325.

A long line of Commission precedents had established the principle that a railroad seeking to impose a separate charge for a service already included in the line-haul rate must establish that the line-haul rate is reasonable for the reduced service. The three-judge district court found that the railroads had not carried the burden of establishing the reasonableness of the existing line-haul rate for the reduced service the railroads proposed to offer, and that the Commission's decision upholding the charges had not given an adequate explanation for departing from the principle established in earlier Commission precedents. The court remanded the matter to the Commission for further proceedings and ordered the collection of the proposed

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[3]The railroads do not perform the grain inspection. They simply make the cars available for sampling by government-licensed grain inspectors.

charges suspended. *Wichita Board of Trade v. United States*, 352 F. Supp. 365 (D. Kan. 1972) (App. (ii)(b) at A-29)

This Court granted a stay pending the railroads' appeal to this Court (App. (ii) (d)). The stay required the railroads to keep accurate account of all amounts collected during the existence of the stay and to refund such amounts to the persons on whose behalf they were paid if the decision of the district court were affirmed. The stay order further provided:

> In the event this Court's action should be other than an affirmance of the results reached by the district court, this Court may make such further order concerning the disposition of the aforesaid amounts as the Court may deem appropriate. (App. (ii) (d) at A-62.)

This Court affirmed the district court's decision on the merits, but reversed the district court insofar as it had enjoined collection of the charges and directed that court "to enter an order, consistent with this opinion, regarding the disposition of" the amounts collected by the railroads while the case was before this Court. *Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade* (App. (ii) (c) at A-31, n.l.) The district court then remanded the matter to the Commission for further proceedings to reconsider the administrative finding that the charges were reasonable (App. (ii) (c)).

On January 21, 1975, the Commission found that repudiation of the long-established rule that "the line-haul rates, as increased through a diminution of service thereunder, [must] be justified by appropriate evidence establishing that the aggregate charge for the through service is reasonable" would not be in the public interest; and it concluded that the railroads had not carried their burden of proof on the issue of reasonableness. *Inspection in Transit, Grain and Grain Products* (App. (ii) (f) at A-121).

Accordingly, the Commission found that the charges "are not shown to be just and reasonable and otherwise lawful." *Id.* at A-123.

Because of this Court's holding in *United States v. Morgan*, 307 U.S. 183, 198 (1939) *(Morgan III)*,[4] that the disposition of amounts collected while a stay order is in effect is determined by whether the charges are ultimately found by the agency to have been lawful or unlawful, Petitioners awaited the decision of the Commission before filing a motion in the district court for refund of the amounts collected during the period covered by this Court's stay, July 7, 1972, through June 18, 1973.

The Secretary of Agriculture elected to pursue a different remedy. He filed a motion with the Commission under Section 15(7) of the Act seeking refunds for the entire three year-period that the charges were in effect. That motion was dismissed summarily and the Secretary appealed to the Court of Appeals for the District of Columbia Circuit. That court remanded the proceeding to the Commission for an explanatin of why it had denied relief. It directed the Commission specifically to advise whether, if shippers filed individual complaints seeking reparations, each shipper would be required to demonstrate that the charges were unreasonable rather than relying on the Commission's earlier "not shown to be just and reasonable" finding. *Secretary of Agriculture v. I.C.C.* (App. (iv) (b) at A-177).

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[4] *Morgan* was before this Court four times. *Morgan I* is reported as *Morgan v. United States*, 298 U.S. 468 (1936); *Morgan II* is reported as *Morgan v. United States*, 304 U.S. 1 (1938); *Morgan IV* is reported as *United States v. Morgan*, 313 U.S. 409 (1941.) Only *Morgan II* and *Morgan III* are discussed herein.

Meanwhile, the district court granted Petitioners' motion for refunds for the stay period by its decision and order of February 23, 1977 (App. (ii) (j)). That order also placed the refund procedures under the judicial supervision of the district judge. The railroads appealed that order to this Court. In response to representations by the Department of Justice and the Commission of a relationship between this case and the *Secretary of Agriculture* case, the Court remanded this case to the district court with directions to remand it to the Commission for further consideration in connection with its reconsideration of the *Secretary of Agriculture* case (App. (ii) (h)). In compliance with such direction, the district court remanded the matter to the Commission by its order of August 22, 1977 (App. (ii) (k)).[5]

The Secretary's motion for refunds, on its face, appeared to cover the entire period during which the rates were in effect. But the Commission recognized that it had no jurisdiction over the rates collected while this Court's stay was in effect. It stated:

> The Supreme Court's stay covered the period from July 7, 1972 to June 18, 1973. The period covered

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[5]In the district court, Commission counsel had opposed the original refund motion of the Petitioners on the sole ground that the Commission had not passed on the reasonableness of the rates but had found only that the rates were not shown to be just and reasonable. Because of the directive from the Court of Appeals for the District of Columbia Circuit, the Commission was required on this remand to face squarely the question of whether shippers could rely on the Commission's "not shown to be just and reasonable" holding as a final resolution of the reasonableness issue. It held that they could. The Comssion rejected the railroad's argument that the in-transit inspection charges were just and reasonable, stating that "[t]hat issue may not be relitigated" *Inspection in Transit, Grain and Grain Products* (App. (ii) (g) at A-136). The Commission thus held squarely that the charges were unlawful.

> by the Secretary's petition includes the time from the date the railroads initially placed the rates into effect, May 4, 1971, to the date of the stay's issuance, plus the period from the end of the stay to March 28, 1975, when the charges were ultimately canceled by the railroads.

(App. (ii) (g) at A-139, n. 22.)

Having described the Secretary of Agriculture's petition as one "which covers the period when the stay order was not in effect" (App. (ii) (g) at A-140), the Commission denied the petition. As to the period covered by the stay order, it ordered "that the District Court for the District of Kansas be *advised* not to refund those monies under *its jurisdiction.*" (App. (ii) (g) at A-152.) (Emphasis added.)

After the Commission's advisory decision was issued, Petitioners renewed their motion in the district court for an order requiring the railroads to refund amounts collected during the pendency of the stay order "to the persons in whose behalf such amounts were paid." On May 6, 1982, Judge Theis granted the motion.[6]

Judge Theis also directed the railroads to file a written accounting and tender the amounts collected into court, reserving decision on the amount of interest which might be due on such funds. *Wichita Board of Trade v. United States*, No. 4730 (D. Kan. May 6, 1982). (App. (ii) (a) at A-20.) The court further ordered that Petitioners file a statement

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[6]Judge Theis explained at length his reasons for declining to adopt the advice of the Commission, which he deemed "quite unpersuasive, as well as grossly inequitable" (App. (ii) (a) at A-17). He noted that "(t)he shippers of the grain during the period of the stay had in fact been forced to pay for the inspections twice, once in the inspection fee, and again in the line haul rate" (*id.* at A-14), and rejected the Commission's recommendation that the shippers be relegated to filing individual complaints for recovery, pointing out that the claims were individually too small to support litigation and that the statute of limitations had run. (A-15).

detailing on whose behalf the payments were made, expressing the intention to have the moneys identified "for ultimate refund or reimbursement to the actual payers of such in-transit charges at the farmer and/or country elevator levels" (App. (ii) (a) at A-21).

The railroads and the government appealed this order to the court of appeals. The court of appeals ignored the merits of the district court decision, reversing on the following grounds:

1. The district court did not have subject matter jurisdiction because its October 3, 1973 remand to the Commission did not expressly state that jurisdiction was reserved.

2. Whether the unlawful charges should be retained by the railroads or returned to the shipper was a matter within the exclusive primary jurisdiction of the Commission.

3. Although this Court's decision of June 18, 1973, had expressly instructed the district court to enter an order disposing of the funds accumulated pursuant to the stay order, that decision should be construed as a holding that the question of reparations was to be determined by the Commission and not by the court.

4. A single judge lacked jurisdiction to issue a refund order.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals includes a number of serious errors which compel this Court's review: the decision of the court of appeals not only has made it impossible for the district court to comply with this Court's directive that it order disposition of the funds collected while this Court's stay order was in effect; but is also in direct conflict with holdings of this Court on no less than three fundamental issues of major importance.

I.

THE HOLDING BY THE COURT OF APPEALS THAT THE DISTRICT COURT HAD LOST JURISDICTION OVER THE CASE FRUSTRATES THE MANDATE OF THIS COURT

In compliance with this Court's decision affirming the setting aside by the district court of the Commission's initial decision, the district court, by order of July 31, 1973, remanded the proceeding to the Commission for determination of the lawfulness of the charges (App. (ii) (i).) That order did not expressly state that jurisdiction was reserved. But such a statement was unnecessary because the district court was subject to an order from this Court requiring it to dispose of the funds accumulated while the stay was in effect. It could not surrender jurisdiction until it had done so.

Under the directive and mandate from this Court, the district court's jurisdiction continued until it ordered disposition of the funds subject to its jurisdiction. Under the principle of *Morgan III*, discussed *infra* at 11-13, the district court could not order disposition of the fund until after the Commission, in the exercise of its primary jurisdiction, had determined whether the charges were lawful.[7] The district

[7]That the district court did not intend to surrender jurisdiction is made clear in its opinion of February 23, 1977, in which it stated:

> In accordance with Supreme Court mandate, by order filed August 13, 1973, this Court remanded the matter to the ICC for further proceedings consistent with the opinion of the Supreme Court. No order was then entered by the Court regarding the distribution of the amounts received by the railroads by reason of their collection of the in-transit grain inspection charges during the existence of the stay, for the obvious reason further administrative action by way of reconsideration of the justness and reasonableness of the proposed rates was directed by both this Court and the Supreme Court. (App. (ii) (j) at A-158.)

court was not asked to review the Commission's decision after remand. To the contrary, Petitioners relied on the Commission's uncontested determination that the charges were unlawful and that was the basis for the district court's ruling on the refund motion.[8]

This Court's subsequent order of June 27, 1977 (App. (ii) (h)) directing the District Court to obtain the Commission's views as to refunds did not strip the district court of the jurisdiction entrusted to it by this Court's directive of June, 1973 to decide who was entitled to the fund under its jurisdiction. If this Court had believed that the district court lost jurisdiction over the fund collected during the stay by failing to state that it was reserving jurisdiction in its 1973 remand order, this Court presumably would have reversed the district court with instructions to dismiss for want of jurisdiction, thereby saving six years of litigation of a "moot" case. Furthermore, had this Court intended to terminate the district court only to obtain the views of disposing of the funds, it could have said so. The Court's order required the district court only to obtain the views of the Commission before taking dispositive action. This is not an unusual procedure. *See Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411 (1959); *Rosado v. Wyman*, 397 U.S. 397 (1970).

The Commission recognized the district court's continuing jurisdiction, as it neither granted nor denied refunds for the period of the stay order. In its decision of February 9, 1979 (App. (ii) (g)), the Commission expressly recognized that it did not have jurisdiction to order the disposition of the fund because the charges collected during

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[8]Had this Commission's subsequent decision been reviewed either in the Kansas court or in another court, the Kansas court would still have been obligated to order disposition of the funds under its control as soon as there was a final Commission decision, not subject to further judicial review, determining whether the charges were lawful or unlawful.

the stay period were under the jurisdiction of the district court. The Commission stated with the utmost clarity that it was only *advising* the court as to how it believed the court's equitable jurisdiction should be exercised (App. (ii) (g) at A-152).

Petitioners did not seek review of that order, because it did not purport to direct a disposition of the funds accumulated during the stay period. That remained for the district court to decide, giving appropriate consideration to the Commission's advisory opinion. Accordingly, Petitioners asked the district court to exercise its equitable jurisdiction after considering the views of the Commission; and the district court properly did so.

In short, the district court was simply complying with the directive from this Court to enter an order disposing of the fund under its jurisdiction. In holding that the district court lacked jurisdiction to decide an issue that this Court had ordered it to decide, the court of appeals prevented the district court from obeying the mandate of this Court. In so doing, the court of appeals acted beyond its authority.

II.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISION OF THIS COURT IN MORGAN III

Morgan III arose under the Packers and Stockyards Act. The Secretary of Agriculture had declared the schedule of maximum rates for the service at the Kansas City stockyards to the unlawful and had prescribed a lower schedule of rates. Stockyard companies supplying the services filed suit in the district court, which temporarily restrained the Secretary's order on condition that the companies deposit with the clerk of the court the difference between the existing rates and the rates prescribed by the Secretary. It ultimately sustained the Secretary's order.

In *Morgan II*, this Court held the Secretary's order invalid and remanded the case to the district court. 304 U.S. at 22. On remand, the district court held that, since this Court had found that the Secretary's order was unlawful (and therefore the district court had erred in requiring that the funds be paid into court), the funds must go to the stockyard companies. *Morgan v. United States*, 24 F. Supp. 214 (W.D. Mo. 1938). In *Morgan III*, this Court reversed, pointing out that it is a "guiding principle" that:

> [I]n reviewing the action of the Secretary and *in similarly reviewing the action of the Interstate Commerce Commission* in conformity with the provisions of the Urgent Deficiencies Act, *the District Court sits as a court of equity*, see Ford Motor Co. v. National Labor Relations Board, 305 U.S. 364, 373; Inland Steel Co. v. United States, 306 U.S. 153; and in exerting its extraordinary powers to stay execution of a rate order, and in directing payment into court of so much of the rate as has been found administratively to be excessive, *it assumes the duty of making disposition of the fund in conformity to equitable principles.*

307 U.S. at 191. (Emphasis supplied.)

Applying equitable principles, this Court held that the disposition of a fund accumulated as an incident to review of an order of an administrative agency is not governed by whether the decision of the court that led to the accumulation of the funds was right or wrong but by whether the rates were lawful or unlawful; and that, therefore, the court must await the determination by the agency *of that issue* and then order disposition of the fund accordingly.

In the instant case, the Commission held on the first remand that the charges were not shown to be just and reasonable (App. (ii) (f) at A-123), and, on the second remand,

that the unreasonableness of the charges had been settled and could not be relitigated (App. (ii)(g) at A-136). It follows that the fund should go to those who paid the unlawful charges. The holding of the court of appeals that the railroads are entitled to retain the fund is thus squarely in conflict with this Court's decision in *Morgan III*.[9]

III.

THE CONSTRUCTION BY THE COURT OF APPEALS OF THIS COURT'S MANDATE CONFLICTS WITH ESTABLISHED PRINCIPLES GOVERNING THE CONSTRUCTION OF MANDATES.

It is settled law that, on remand, a district court "may consider and decide any matters left open by the mandate of this Court." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895). *Accord, Perkins v. Standard Oil of Calif.*, 399 U.S. 222, 223 (1970); *Quern v. Jordan*, 440 U.S. 332, 347 n. 18 (1979). The opinion of this Court in *Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade* (App. (ii)(c)) settled only two issues: that the district court was correct in setting aside the Commission's order of September 21, 1971,

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[9]The court of appeals sought to distinguish *Morgan III* on two grounds: that *Morgan III* arose under a different statutory scheme, and that the funds had not been paid into the registry of the court. That *Morgan III* arose under a different statute (although the Packers and Stockyards Act is modeled after the Interstate Commerce Act) is irrelevant. *Morgan III* lays down a broad principle governing the relationship between courts and administrative agencies. And the fact that in *Morgan* the funds had been physically paid into court, whereas here the funds were ordered to be accumulated by the railroads and held for ultimate disposition, is not determinative of who should be awarded these funds. It is enough that the funds are under the control of the court. The same principle applied in *Morgan III* was applied in *Inland Steel Co. v. United States*, 306 U.S. 153 (1939), where, as here, the railroads were not required to pay the moneys into court but rather to keep account.

and that the district court was in error in enjoining collection of the inspection charges. The disposition of the funds under control of the district court was left open by the remand and the district court was expressly directed to decide that issue. (App. (ii) (c) at A-31, n.1.) The court of appeals gave scant attention to whether the district court's decision was correct. Instead, it construed the phrase "consistent with this opinion" in this Court's opinion as a direction not to dispose of the fund under legal and equitable principles but to guess how this Court would have decided the issue if it had decided it.[10]

From its reading out of context of a single paragraph of this court's opinion, the court of appeals found an "intent" that "reparations are for decision by the ICC, not the Kansas Court" (App. (i) at A-8), and that this Court, without saying so, had "left reparations to the ICC in the exercise of it primary jurisdiction ..." *Id.* at A-9. In the face of this Court's instruction to the district court to make an appropriate disposition of the fund, the court of appeals concluded: "Also, we find no intent of the Supreme Court that the Kansas court retain jurisdiction over any matters which might arise under the Court's 1972 stay order". (App. (i) at A-11) Thus, the direction of this Court to the district court to decide the disposition of the fund collected under this Court's stay was nullified by the court of appeals.

It is the established practice of this Court not to decide isue without the benefit of their initial consideration by the

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[10]In *Morgan II*, the remand was "for further proceedings in conformity with this opinion." 298 U.S. at 482. On remand, the district court, instead of determining what disposition was required by equitable principles, tried to guess how this Court would have decided the issue based on its reading of *Morgan II*. This Court reversed the district court because it had made the same error made by the court of appeals here.

lower court, especially where, as here, the issues have not been briefed or argued to it.[11] The purpose of a remand is frustrated if the lower court decides the issue by trying to parse the decision out of which the remand grew, instead of giving the issue the full consideration required.

IV.

THE HOLDING BY THE COURT APPEALS THAT REPARATIONS ARE WITHIN THE PRIMARY JURISDICTION OF THE COMMISSION CONFLICTS WITH A.J. PHILLIPS CO. V. GRAND TRUNK WESTERN RAILROAD

Section 8 of the Interstate Commerce Act[12] creates an absolute right to recover damages sustained by reason of the imposition of an unlawful charge by a railroad;[13] and

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[11]*See, e.g., Manufacturers' Finance Co. v. McKey*, 294 U.S. 442, 453-454 (1935); *United States v. Malphurs*, 316 U.S. 1, 3 (1942); *Bates v. United States*, 323 U.S. 15, 17 (1944); *Special Equipment Co. v. Coe*, 324 U.S. 370, 380 (1945); *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 540 (1958).

[12]References are to the Interstate Commerce Act as in effect at the time this controvery arose. Sections 8 and 9 of the Act are now 49 U.S.C. §11705(b) (2) and §11705(c) (1), respectively.

[13]If Petitioners had sought reparations in a proceeding before the Commission, the award of reparations would have been mandatory because the Commission has found that the charges were unreasonable and has held that finding could not be relitigated in a reparations proceeding. In *Insulating Materials, Between Points in Official Territory*, 364 I.C.C. 599, 601 (1981), the Commission held:

> In the case of a rate increase found unlawful on reasonableness grounds, the measure of refunds (i.e., damage) is clear. Given market dominance, the shipper has no choice but to pay a rate later found too high and no further evidence of harm is necessary. See *Mayo Shell Corp.* v. *Chicago, R. I. & P. R. Co.*, 293 I.C.C.

Section 9 permits the shipper to enforce that right either in a proceeding before the Commission or by action in a District Court. Since the Commission would have had no discretion to deny reparations, it follows that the award of reparations following a Commission finding of unlawfulness is not a matter within the primary jurisdiction of the Commission.

In *A. J. Phillips Co. v. Grand Trunk Western Railroad*, 236 U.S. 662 (1915), this Court held that, once the Commission had found that a rate was unlawful, that finding inured to the benefit of every person who had been obligated to pay the unjust rate; and that a shipper who had not been a party to the Commission proceeding could maintain an action at law for damages.[14]

The court of appeals relies on *Burlington Northern, Inc. v. United States*, _____U.S. _____, 103 S.Ct. 514, 521 (1982); *reh'g denied* 103 S.Ct. 1238 (1983), as authority to the contrary. This Court there said that:

243, 246-47 (1954). Therefore, for obvious reasons, what discretion we have to limit refunds is not exercised in this circumstance and refunds are, in effect, automatic.

To the same effect in *U.S. Department of Energy v. Baltimore and Ohio Railroad*, 364 I.C.C. 951, 975 (1981): "Under 49 U.S.C. 11705(b)(2), a railroad is 'liable for damages sustained' when it violates the statute. It is the Commission's duty to award the full amount of damages sustained in consequence of any violation..." (Footnote ommitted).

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[14]Moreover, if a reparations action is instituted in a federal district court, it is appropriate for the court to reserve jurisdiction pending a Commission decision on the issue of lawfulness. *See United States v. I.C.C.*, 337 U.S. 426, 446-466 (1949) (Frankfurter, J., Jackson, J., and Burton, J., dissenting), and cases there cited. If a shipper can recover unlawful charges paid by it in action at law, it follows, *a fortiori*, that a court of equity which has the moneys under its jurisdiction can grant the same relief.

> where there is a dispute about the appropriate rate, the equities favor allowing the carrier's rate to control *pending decision by the Commission,* since under the Act, the shipper may receive reparation for overpayment while the carrier can never be made whole after underpayment. (Emphasis supplied.)

Burlington Northern does not address the question of primary jurisdiction to award damages *after a rate has been found to be unlawful.* The quoted language holds only that the carrier may continue to collect the rate while its lawfulness is being determined by the Commission, which is consistent with this Court's holding in its first decision in this case. It does not address the question whether a court may award damages once the Commission has passed on the lawfulness of the rate.[15]

V.

THE HOLDING BY THE COURT OF APPEALS THAT A SINGLE JUDGE HAD NO JURISDICTION TO ISSUE AN ORDER DISPOSING OF THE FUND CONFLICTS WITH THE DECISION OF THIS COURT IN PUBLIC SERVICE COMMISSION V. BRASHEAR FREIGHT LINES

Although it did not reverse on this basis, because it recognized that the "defect" could be cured on remand by a three-judge district court, the court of appeals also held that a single judge lacked jurisdiction to order disposition of the fund pursuant to this Court's directive. The three-judge district court, having disposed of the issues for which the three-judge court was constituted, properly directed the single judge to order disposition of the fund. In *Public*

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[15]Curiously, the court of appeals in the instant case cited the policy preamble to the Staggers Rail Act of *1980* as support for its conclusion that this Court's opinion *in 1973* must be read as holding that only the ICC may award refunds. (App. (i) at A-11.)

Service Commission v. Brashear Freight Lines, 312 U.S. 621 (1941); *reh'g denied*, 313 U.S. 598 (1941), this Court noted that "the motion for damages raised questions not within the statutory purpose for which the two additional judges had been called" (312 U.S. at 625) and held that assessment of damages was properly for a single district judge. *See also United States v. I.C.C.*, 337 U.S. 426, 440-43 (1949), holding that one judge rather than three should entertain challenges to Commission reparation orders because of "the importance of limiting the three-judge court procedure within its expressly stated confines." 337 U.S. at 443.

CONCLUSION

For the reasons stated, certiorari should be granted and the case should be reversed summarily or set for briefing and oral argument.

Respectully submitted,

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September 14, 1983

APPENDICES

The WICHITA BOARD OF TRADE, et al., Plaintiffs-Appellees,

v.

The UNITED STATES of America and the Interstate Commerce Commission, Defendants-Intervenors,

and

Atchison, Topeka and Santa Fe Railway Company, et al., Intervening Defendants-Appellants.

No. 82-1808.

United States Court of Appeals, Tenth Circuit.

April 28, 1983.

Charles J. McCarthy, Washington, D.C. (Daniel J. Sweeney of McCarthy, Sweeney & Harkaway, P.C., Washington, D.C., Glaves, Weil & Evans, Wichita, Kan., with him on brief), for plaintiffs-appellees.

Henri Rush, Associate Gen. Counsel, Washington, D.C. (John Broadley, Gen. Counsel, and Craig M. Keats, Atty., I.C.C., Washington, D.C., with him on briefs), for I.C.C.

Christopher A. Mills, Chicago, Ill. (Charles W. Harris of Curtman, Harris, Stallings Grace & Snow, Wichita, Kan., with him on briefs), for intervening defendants-appellants.

Before SETH, LOGAN and BREITENSTEIN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This controversy over railroad freight rates on grain has followed a tortuous and unusual path through a maze of administrative and judicial proceedings. Any simple statement of the facts, issues, and procedures is impossible. The appeal by the railroads attacks a judgment of the United States District Court for the District of Kansas which held that the rates imposed were unlawful and ordered the railroads to file an accounting of the moneys collected during a stay period and pay the amounts wrongfully collected into the registry of the court. The United States and the Interstate Commerce Commission have been permitted to intervene in the appeal. We reverse on jurisdictional grounds.

In 1970 the railroads proposed a charge, separate and above the applicable line-haul rate, for the inspection of grain in-transit. The proposal covered the western territory. At the time a similar charge was in effect for the eastern territory. In-transit inspection refers to the stopping of cars loaded with grain, placing them on railroad track facilities,

determination of the grade of the grain, and subsequent movement of the car to its destination. The process is described in more detail in *Atchison T. & S.F.R. Co. v. Wichita Board of Trade*, 412 U.S. 800, 803, 93 S. Ct. 2367, 2372, 37 L. Ed. 2d 350, and particularly n. 2. This decision will be hereafter referred to as *AT & SF v. Wichita*. See also Inspection in Transit of Grain and Grain Products, 339 I.C.C. 364, 365.

A chronology of the administrative and judicial actions will be helpful.

(1)— April 16, 1971. Interstate Commerce Commission (ICC) Div. 2 order holding the in-transit charges were just, reasonable, and lawful. 339 I.C.C. 364.

(2)—September 21, 1971. In banc ICC order affirming Div. 2 order in all pertinent respects. 340 I.C.C. 69.

(3)—May 26, 1972. Order and judgement of a three-judge district court for the District of Kansas setting aside the rate, remanding the matter to ICC, and suspending the charges until otherwise ordered by the court. 352 F. Supp. 365.

(4)—July 7, 1972. Order of Supreme Court staying judgment of the Kansas court until final determination of the railroads' appeal and requiring the railroads to keep account of charges received. 409 U.S. 801, 93 S. Ct. 24, 34L. Ed.2d. 14.

(5)—June 18, 1973. Supreme Court decision on merits affirming lower court's remand to ICC and reversing that court's injunction suspending the proposed charges. 412 U.S. 800, 826, 93 S.Ct. 2367, 2384, 37 L.Ed.2d 350.

(6)—August 3, 1973. Order of Kansas court remanding cause to ICC but saying nothing about retention of jurisdiction. R. 271.

(7)—January 21, 1975. ICC order on remand holding that the charges were not shown to be just and reasonable. 349 I.C.C. 89, 97. ICC ordered prospective cancellation of the charges. With respect to refund of collected charges it said, Id. at 93, "should relief in addition to that which is provided in this report and order be desired by protestants, action under section 13(1) of the act must be commenced." Section 13(1) has been recodified as 49 U.S.C. § 11701.

(8)—September 5, 1975. The Secretary of Agriculture, in his statutory capacity as representative of farm interests, moved ICC for a general refund order under 49 U.S.C. §15(7). Section 15(7) has been recodified as 49 U.S.C. §10708(b).

(9)—November 12, 1975. ICC summarily denied motion of Secretary. Docket No. 8548.

(10)—February 11, 1977. On Secretary's appeal of ICC order denying general refunds, the District of Columbia court of appeals reversed the ICC denial of the Secretary's refund motion and remanded the cause to the ICC. *Secretary of Agriculture v. I.C.C.*, D.C. Cir., 551 F. 2d 1329, 1331.

(11)—February 23, 1977. Kansas district court ordered railroads to account and pay for charges collected. R. 66-67.

(12)—June 26, 1977. Supreme Court vacated Kansas court account and pay order and remanded with directions to remand cause to ICC for further consideration in connection with its reconsideration under the order of the District of Columbia Circuit. 433 U.S. 902, 97 S.Ct. 2964, 53 L.Ed.2d 1087.

(13)—August 22, 1977. Kansas court order remanding cause to ICC with no provision for retention of jurisdiction. R. 70.

(14)—February 9, 1979. ICC order on remands. 359 I.C.C. 624. Charges held under Supreme Court "keep account" order should not be returned under a blanket refund order. Id. at 636-637. Kansas court advised to deny petition for refund of monies under its jurisdiction. Id. at 636. Shippers told to seek refunds in individual complaint proceedings under 49 U.S.C. § 11701. Id. at 637-638.

(15)—August 16, 1979. District of Columbia Circuit's dismissal of action brought by Secretary of Agriculture. Docket No. 76-1026.

(16)—May 6, 1982. Order of Kansas court reentering its account and pay order, R.227-234, and denying reconsideration on June 22, 1982. R. 262.

(17)—June 29, 1982. Railroads' appeal from account and pay order docketed in the Tenth Circuit.

The plaintiffs-appellees are the Wichita Board of Trade and 37 other shipper organizations and shippers. The intervening defendants-appellants are the Atchison, Topeka and Santa Fe Railway Company and 33 other railroads. The United States and ICC are intervenors. The record does not show the amount of money at stake. The district court order covers the stay period beginning July 7, 1972, 409 U.S. 801, 93 S.Ct. 24, 34 L.Ed.2d 14, and ending June 18, 1973, 412 U.S. 800, 826, 93 S.Ct. 2367, 2384, 37 L.Ed.2d 350. The record does not show what accounting, if any, was made and does not show that the railroads have paid any money into the court registry. ICC comments on total collections of the in-transit charges are found at 349 I.C.C. 95. In its 1979 decision, ICC said that "[t]he equitable aspects of refunding past rates are ... inextricably entwined with the Board's normal regulatory responsibility, as such

refunds may substantially affect the future rates, performance and health of the industry." 359 I.C.C. at 634, n. 52.

The appellees moved to dismiss this appeal on the ground that jurisdiction did not lie in the court of appeals under either 28 U.S.C. § 1291 or § 1292(a). Another panel of this court denied the motion to dismiss by order entered January 14, 1983.

A preliminary question relates to the power of one judge of the three-judge panel to act alone in the entry of the May 6, 1982, account and pay order of the district court. When the case was filed in 1971, the Judicial Code, 28 U.S.C. § 2325, provided that actions to overturn ICC decisions should be brought in a federal district court and heard by a panel of three judges. Review of its judgment was by direct appeal to the United States Supreme Court. In 1975 Congress repealed § 2325 and provided for review of ICC orders by the courts of appeals. 88 Stat. 1917-1918. See 28 U.S.C. § 2341 et seq. The repealing act privided, 88 Stat. 1918, that is shall not affect pending actions which "shall proceed to final disposition under the law existing on the day they were commenced."

The three-judge panel on February 23, 1977, sustained the motion for refund and ordered R. 67, that all further proceedings be transferred to the resident judge for such further action as he finds necessary. Proceedings before three-judge district courts are governed by 28 U.S.C. § 2284. It provides that a single judge may conduct all proceedings except trial but he may not "enter judgment on the merits."

Any action by a single judge "may be reviewed by the full court at any time before final judgment." The resident judge entered the remand order of August 22, 1977, the May 6,

1982 account and pay order, and the June 22, 1982, order denying reconsideration. All of these were final judgments on the merits and were not approved by the panel. One judge had no power to enter them alone. No review by the panel was requested. We decline to reverse because of this assertion of power by one judge because on remand it would be possible that the panel will uphold the orders. We conclude that it is necessary to consider the jurisdiction of the panel over the cause.

Consideration of the jurisdiction of the Kansas court presents intertwined problems of procedure and substance. The district court suspended the proposed in-transit charges and said that they "shall be ineffective until and unless otherwise ordered by this Court." 352 F. Supp. at 369. On the application of the railroads, the Supreme Court stayed the district court order on condition that the railroads keep accurate accounts of charges collected and *in the event the Court affirms the suspension of the rates* the railroads shall pay the amounts collected to those entitled to them. 409 U.S. 801, 93 S.Ct. 24, 34 L.Ed. 2d 14.

When the case came before the Supreme Court on the merits it noted the stay order and said: "We hereby direct the District Court to enter an order, *consistent with this opinion*, regarding the disposition of those amounts." [Emphasis supplied.] 412 U.S. at 802, n. 1, 93 S.Ct. at 2372, n. 1. In disposing of the case, the Court said, 412 U.S. at 826, 93 S.Ct. at 2384:

> "Here the Commission ordered the railroads to maintain records of the amounts collected as a result of the new charge. It may be that this adequately protects the shippers from irreparable damage, in the light of the availability of actions for reparations. The

> Commission may determine on remand that some further steps must be taken to protect the shippers. But in any event, it is clear that the District Court should not have entered the injunction it did. The action of the District Court is affirmed as to the remand to the Commission and is *reversed as to the injunction suspending* the proposed charges."[Emphasis supplied.]

The Court did *not* affirm the suspension of the charges.

We believe that the quoted language expresses the intent that reparations are for decision by the ICC, not the Kansas court. The district court must have so interpreted the Supreme Court order because it remanded the cause to ICC without retention of jurisdiction. R. 271.

After ICC acted, 349 I.C.C. 89, no proceeding was brought for review of that action in the Kansas court. Instead Wichita Board of Trade moved, in its original action, for refunds. The Kansas court granted the motion in its 1977 account and pay order. R. 56-67. The railroads appealed that order. The Supreme Court summarily reversed with directions to remand the case to ICC *for further consideration in connection with the D.C. Circuit case*. 433 U.S. 902, 97 S.Ct. 2964, 53 L.Ed. 2d 1087. The Kansas court again remanded the case to ICC without retention of jurisdiction. R. 70. By its remand without retention of jurisdiction, the Kansas court terminated its power and jurisdiction over all matters connected with review of ICC action. See *Greater Boston Television Corporation v. F.C.C.*, D.C. Cir., 463 F.2d 268, 287, cert. denied, 406 U.S. 943, 92 S.Ct. 2042, 32 L.Ed. 2d 339, and *Chemical Leaman Tank Lines, Inc. v. U.S.*, D.Del., 446 F. Supp. 721. Appellees say that these decisions are not pertinent because they reflect only the policy of the courts

involved. We believe that the better practice is for a court to expressly retain jurisdiction if such is its intent.

The effect of the Supreme Court's actions was to have the question of reparations considered and determined by the ICC, subject to appropriate judicial review. The 1982 decision of the Court in *Burlington Northern, Inc. v United States*, _____ U.S. _____, 103 S.Ct. 514, 74 L.Ed.2d 311, reviewed its decisions on the respective authority of the ICC and the courts with regard to railroad freight rates. After citing *AT & SF v. Wichita*, 412 U.S. 800, 93 S.Ct. 2367,37 L.Ed.2d 350, and other cases, the Court said, Id., 103 S.Ct. at 521, that those cases stand for three propositions: (1) primary jurisdiction to determine reasonable rates lies with ICC; (2) judicial authority to reject ICC rate orders "extends to the orders alone, and not to the rates themselves," and (3):

> "where there is a dispute about the appropriate rate, the equities favor allowing the carrier's rate to control pending decision by the Commission, since under the Act, the shipper may receive reparation for overpayment while the carrier can never be made whole after underpayment."

The directions given by the Supreme Court in 412 U.S. at 802, n. 1, and 826, 93 S.Ct. at 2372, n. 1, and 2384, and in 433 U.S. 902, 97 S.Ct. 2964, 53 L.Ed. 2d 1087, mean to us that the Court left reparations to the ICC in the exercise of its primary jurisdiction granted by §§ 13(1) and 15(7) of the Interstate Commerce Act, amended, and codified, and now appearing at 49 U.S.C. §§ 10707 and 11701.

Appellees support the jurisdiction of the Kansas court to enter the account and pay order by reliance on *United States v. Morgan*, 307 U.S. 183, 59 S.Ct. 795, 83 L.Ed. 1211.

Morgan arose under a different statutory scheme, the Packers and Stockyards Act, and the funds at stake had been impounded. Id. at 187, 59 S.Ct. at 798. Nothing in the record shows that any funds have been paid into the court registry. The applicability of Morgan is inconsistent with the Supreme Court's second remand in this case. 433 U.S. 902, 97 S.Ct. 2964, 53 L.Ed.2d 1087.

Reliance on *Indiana & Michigan Electric Company v. Federal Power Commission*, D.C. Cir., 502 F.2d 336, cert. denied, 420 U.S. 946, 95 S.Ct. 1326, 43 L.Ed.2d 424, is also misplaced. That case arose under the Federal Power Act. The court exercised its equitable powers because of the unique procedural aspects of the case. See 502 F.2d at 347-348.

To support the jurisdiction of the Kansas court to enter the account and pay order, the Appellees cite 28 U.S.C. §§ 1336 and 1398. Section 1336 confers district court jurisdiction over ICC orders for the payment of money. In the case at bar ICC made no such order. Section 1398 refers to district court jurisdiction of an ICC order made pursuant to a referral. No referral was made here. The cause was remanded to ICC.

A further argument of Appellees is that the Kansas court had jurisdiction to implement and enforce its own order. Reference has to be to the 1977 account and pay order of the Kansas court. The Supreme Court vacated that order, 433 U.S. 902, 97 S.Ct. 2964, 53 L.Ed.2d 1087. Nothing was left of it to be either implemented or enforced.

We find nothing in the long history of this controversy to indicate that the Kansas court had any jurisdiction of the cause after its remand to the ICC pursuant to the order of

the Supreme Court, 412 U.S. at 826, 93 S.Ct. at 2384. Also, we find no intent of the Supreme Court that the Kansas court retain jurisdiction over any matters which might arise under the Court's 1972 stay order, 409 U.S. 801, 93 S.Ct. 24, 34 L.Ed.2d 14. As we read Burlington Northern, reparations are under the primary jurisdiction of ICC with judicial review when appropriate. 103 S.Ct. at 521. This harmonizes with the congressional intent in the Staggers Rail Act of 1980, 94 Stat. 1895 et seq. The purpose of the Act "is to provide for the restoration, maintenance, and improvement of the physical facilities and financial stability of the rail system of the United States." Id. at 1897. ICC is the administrative agency responsible for achievement of the Act's intent.

The Kansas court did not have subject matter jurisdiction to make and enter its orders of May 6 and June 22, 1982. Accordingly, those orders are set aside and held for naught.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

THE WICHITA BOARD OF TRADE et. al., *Plaintiffs.*	)	
vs.	)	Civil Action No. W-4730
THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al., *Defendants.*	)	

MEMORANDUM OPINION AND ORDER OF THE COURT

Once again this Court must resurrect this case from a judicial resting place in limbo and address the question of disposition of the monies received by the railroads during the period of the stay order and "keep account" order of the United States Supreme Court, *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Board of Trade*, 409 U.S. 801, 93 S.Ct. 24, 34 L.Ed.2d 14 (1972). In 1971, the Interstate Commerce Commission approved the imposition of a charge for in-transit grain inspections. Prior to that approval the cost of such inspections had been considered a part of the line haul rate. Sitting as a three-judge court, this court set aside the Commission's order, declared the changes ineffective, and enjoined enforcement of the questioned I.C.C. order, as reported in *Wichita Board of Trade v. United States*, 352 F. Supp. 365 (D. Kan. 1972). The Supreme Court, in an interim order, stayed the injunction and allowed collection of the fees on condition the railroads "keep accurate accounts in detail of all amounts hereafter received during the existence of the stay by reason of in-transit grain inspection charges, specifying by whom and in whose behalf such amounts are paid." 409 U.S. at 801. The purpose of these accounts was to provide repayment, with interest, "to persons in whose behalf such amounts were paid, without necessity for such persons to make applications for refunds" if this Court's order was affirmed. The Court's injunction was not upheld, and the railroads were allowed to continue collecting the contested rate. This Court's view of the merits, however, was affirmed, i.e., that the initial ICC order was illegal, and the matter was ordered remanded to the ICC to again

determine whether the contested fee was reasonable. This Court was instructed by the Supreme Court "to enter an order, consistent with this opinion, regarding the disposition of" the accounts computed as a result of the interim order. *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Board of Trade*, 412 U.S. 800, 802 n. 1, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973). On remand to the ICC, the reasonableness of the fee was not proved and the fee was eliminated. The shippers of the grain during the period of the stay had in fact been forced to pay for the inspections twice, once in the inspection fee, and again in the line haul rate.

In 1977, this Court, again sitting as a three-judge court, issued an order, as it was mandated to do, disposing of the funds. The funds were ordered returned to those who had paid double for the services of the railroad. For the apparent purpose of achieving consistency in judicial disposition, that order was summarily vacated by the Supreme Court, *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Board of Trade*, 433 U.S. 903, 97 S.Ct. 2964, 53 L.Ed.2d 1086 (1977), tobe reconsidered by the ICC in light of *Secretary of Agriculture v. Interstate Commerce Commission*, 551 F. 2d 1329 (D.C. Cir. 1977). That case involved disposition of fund collected by the railroads after the 1972 decision by the Supreme Court, but before the rate was set aside on remand to the ICC.* The D.C. Circuit remanded an ICC refusal to order a general refund of those fees. On remand this case and the Secretary's were consolidated before the ICC, which again declined to order a general refund of the fees collected after the 1972 decision, and recommended this Court do likewise with the funds collected during the stay. *Inspection In Transit, Grain and*

*See Appendix attached.

Grain Products, 359 I.C.C. 624 (1979). Instead, the I.C.C. has decided each claimant must file a separate claim, and prove it is entitled to a refund. The futility or "Catch 22" of such a procedure is: the Commission has determined the statute of limitations will have run for all payments made during the period of the stay. 359 I.C.C. at 637. Therefore, anyone who paid fees during the stay, and then relied upon the mandate to this Court to dispose of the funds on equitable principles, and so did not file a claim with the I.C.C., would be left without any remedy. It is further apparent most of the claims would have been so small as to preclude the individual legal expense of recovery.

The I.C.C.'s position is to the effect the railroads should not have to refund the double charges because it came as such a surprise to the carriers to learn they might have to. The I.C.C. again engages in a long discourse on the difference between unreasonable rates and not reasonable rates, but finally admits the rate was invalid. It then goes to great lengths to explain how the railroads were never on notice that there was any possibility they would have to make refunds. "The district court's reversal of our order was not notice to the carriers that we might withdraw that approval.... This situation is quite distinct from circumstances in which the Commission has given the carriers notice that the rates they are about to collect exceed or may be found to exceed a reasonable maximum level." 359 I.C.C at 630-32. However, the Commission refutes its own distinctions. "Of course, a 'keep account' provision in an order instituting investigation is also notice that refunds may follow. Once a 'keep account' order is entered, the carrier is collecting monies earmarked for return should it fail to convince the Commission that the increased rates are

just and reasonable." 359 I.C.C. at 633. The stay order of the Supreme Court, 409 U.S. 801, was and is very unambiguous notice to the railroads that they were to "keep accurate accounts in detail of all amounts" collected "during the existence of the stay" so there could be a "refund (with interest) of such amounts to persons in whose behalf such amounts were paid, without the necessity for such persons to make applications for refunds." 409 U.S. at 801.

The Court has no need to form or express any opinion on the reasonableness of the Commission's conclusions concerning the post stay charges, but it is clear much of its rationale does not apply to the funds collected during the stay. The fact the railroads cannot be surprised by having to pay, renders inapplicable a number of the Commission's arguments concerning rate making, hardships to the railroads, and speculated damage to rail transportation systems.

If the railroads in fact complied with the order of the Supreme Court, it also disposes of the argument of the railroads that only middlemen will end up getting the refund. The stay clearly states the carriers were to include data on the identity of the party on whose behalf the fees were paid. Additionally, as a double check, the plaintiff grain trade must have access likewise to such information.

Two of those railroads whose finances were seen as in need of protection by the Commission have taken the bankruptcy route, and any opportunity for those who paid them twice for their service has now been lost by the passage of so much time resolving this dispute. There is no longer any need for the Commission to be concerned for the fate of those roads.

The Commission's opinion as a whole is quite unpersuasive, as well as grossly inequitable, as any statement of fairness. Underlying the whole opinion and interlaced within its various parts, is the premise that because no accurate account is possible of the individual farmers paying the illegal fee, no blanket refund should be made to the plaintiff. It can be strongly urged that the tenor of the opinion and the balance of the scales of justice in the Commission's view would otherwise have been with the individual shippers if identifiable. This Court quite agrees that unless reasonable accuracy can be developed as to individual farmer refunds, then plaintiff Boards of Trade are no more entitled to the fund or any part thereof as a windfall profit than are the railroads. Presently, information before this Court, and it is believed more specific information to be sought by this Court, will establish that a substantial part of the available funds will reach the hands of the individual farmer-shippers.

In *Morgan v. United States*, 307 U.S. 183, 59 S.Ct. 795, 83 L.Ed. 1211 (1939), scheduled rates were in dispute. The Secretary of Agriculture had fixed maximum rates to be charged by marketing agencies at the Kansas City Stockyards. The agencies sued to have the order set aside, and to have their higher rate in effect. The dispute portion of the charges was being paid in to the court. The district court found the Secretary's rates were reasonable, but the United States Supreme Court reversed, on procedural grounds. While the matter was still pending on the merits before the Secretary on remand, the district court ordered disposition of the disputed funds to the marketing agencies. It was the position of the district court that since the Secretary could not retroactively effect rates, and since its

previous order was invalid, the marketing agencies were entitled to the funds whether the charges were too high or not. The issue on appeal was whether, if the Secretary determined his schedule was reasonable, "the district court will have, and should exercise, the power to order the distribution of the impounded fund in conformity to his determination by directing that so much, if any, of the amounts paid into court as exceeds the rates ultimately determined ... to be just and reasonable be returned to those who have paid them." 307 U.S. at 188.

The Court held it was error to pay over the funds to the marketing agencies.

> "The district court, in staying the Secretary's order and at the same time arresting the excess payments to appellees under the scheduled rates, assumed the duty of making the proper disposition of the funds.... Its action presupposed that the ownership of the excess payments was in doubt and could be finally determined only by an adjudication of the merits of the reasonableness of the filed rates. In taking the payments into custody it acted as a court of equity, charged both with the responsibility of protecting the fund and of disposing of it according to law, and free in the discharge of that duty to use broad discretion in the exercise of its powers in such a manner as to avoid an unjust or unlawful result." *Id.* at 193-94.

The situation in the present case is similar to that in *Morgan*. The funds are in the hands of the railroads, not the court, but this does not change the fact of the court's power to effect their disposal. See, *Inland Steel Co. v. United States*, 306 U.S. 153, 59 S.Ct. 415, 83 L.Ed. 557 (1939). The

railroads have collected rates which were not reasonable, and the issue is whether the amounts paid in excess of reasonable rates should be left with those who did not earn them, or whether the court should exercise its powers, to avoid an unjust result. In *Morgan*, the court stated:

> "Having prohibited and declared unlawful any unjust or unreasonable rate, a court of equity should be astute to avoid the use of its process to effectuate the collection of unlawful rates." 307 U.S. at 194

The Commission claims its procedures are adequate for giving refunds, by filing individual claims. Such an approach was rejected by the Supreme Court in *Baltimore & Ohio R.R. Co. v. United States*, 279 U.S. 781, 49 S.Ct. 492, 73 L.Ed. 954 (1929). An I.C.C. order was set aside, and plaintiff railroads sought restitution of amounts paid to other railroads while the order was in effect, and after their suit had been erroneously dismissed in the earlier action. The Court held it was error for the district court to deny the application for restitution. The burden of the charges had been shifted, and when the invalid order was set aside those collecting the charges were obliged to make restitution. "If each claim is treated as a separate cause of action enforceable only at law, the number of suits and the burden of maintaining them would be so enormous that the relegation of the east side roads to that remedy would be a virtual denial of justice." 279 U.S. at 786. Justice will be denied in this case as well if the farmers and shippers are forced to litigate claim by claim before the Commission. This is especially so since the Commission has decided to cut off the claims with their selection of a cut-off date, discussed *supra*.

Principles of equity govern this Court's disposition of the funds. The charges were initially approved by the I.C.C. When required to take a hard look at the charges the Commission found them to be legally unsupportable. Now it would have the railroads keep the money anyhow. *American Petrofina Co. of Texas v. Williams Brothers Pipe Line Co.*, 56 F.R.D 488 (D.Kan. 1972) is not on point with the present situation. The challenged rates in that case had never been considered by the Commission, and the question of validity of a rate is peculiarly within the Commission's competence. Here, the rate has already been considered and finally rejected by the Commission, as this Court and the Supreme Court had previously done. Since our Constitution was adopted, the federal courts have acted as courts of equity, and are fully, perhaps even peculiarly, qualified to do so.

The Supreme Court, as pointed out, several times has said unequivocally that a "keep account" order must be kept so there could be a "refund... without the necessity for such persons to make applications for refunds." We therefore rely on the specific words of the Supreme Court, the impregnable equitable basis for return of the fund to its owners, and reject the advice of the I.C.C. in this matter. Thus, again, we exercise our own considered judgment of the equities, as expressed herein and in our previous order of February 23, 1977.

IT IS THEREFORE ORDERED that each defendant railroad, within sixty (60) days of this date, shall file with the Clerk of this Court, at Wichita, Kansas, a written accounting of the in-transit charges collected during the stay period, and tender therewith into the registry of the Court the amount of money collected by each said railroad

from such charges. The Court reserves decision at this time on the amount of interest which may be due on such funds.

IT IS FURTHER ORDERED that each plaintiff shall within ninety (90) days of this date, file a written statement of the amounts paid by it as in-transit charges during such stay period, detailing whether such payment was one directly orginating with it or on whose behalf the payment was made, it being the intention of the Court to have identified for ultimate refund or reimbursement to the actual payers of such in-transit charges at the farmer and/or country elevator levels.

At Wichita, Kansas, this 6th day of May, 1982.

/s/ Frank G. Theis

United States District Judge

APPENDIX

The Supreme Court's stay covered the period from July 7, 1972 to June 18, 1973. The period covered by Agriculture's petition includes the time from the date the railroads initially placed the rates in effect, May 4, 1971, to the date of the stay's issuance, plus the period from the end of the stay to March 28, 1975 when the charges were ultimately canceled by the railroads.

The WICHITA BOARD OF TRADE et al., Plaintiffs,

v.

The UNITED STATES of America and Interstate Commerce Commission, Defendants.

Civ. A. No. W-4730.

United States District Court, D. Kansas. May 26, 1972.

BARRETT, Circuit Judge, and THEIS and O'CONNOR, District Judges.

OPINION OF THE COURT

PER CURIAM.

This is an action to enjoin, annul, set aside, and suspend orders of the Interstate Commerce Commission entered by the Commission, Division 2, on April 16, 1971, and by the Commission en banc on September 21, 1971, in proceedings entitled Investigation and Suspension Docket No. 8548, Inspection in Transit, Grain Products, reported at 339 I.C.C. 364 and 340 I.C.C. 69 respectively. A three-judge court was convened to hear the case. The suit is brought pursuant to the provisions of Sections 1336, 1398, 2284 and 2321-2325 of Title 28 U.S.C.

By the reports and orders here assailed, the Commission has found just and reasonable the establishment of tariff provisions applicable throughout the West at the rate of $13.36 per car for the first in-transit inspection services historically provided by the rail carriers under the line-haul rates. The commission did not require a reduction in the line-haul rates in relation to the reduced service.

The in-transit inspection service with which we are here concerned has reference to the practice of stopping railroad cars loaded with grain and grain products and placing them on railroad track facilities for the purpose of permitting inspection of the contents of the car, awaiting disposition orders from shippers after inspection, and the subsequent movement of the railroad car. The sample or samples tested determine the official grade of the contents of the car for the purpose of establishing its value at market.

This transit service has been historically provided by the rail carriers in the West as part of the line-haul rates. Until 1968, federal law required official federal inspection and sampling. That function was performed by federal officials. That requirement was eliminated by Congress in 1968. 82 Stat. 761, 7 U.S.C. § 71 et seq. The primary purpose of Congress was to effect an increased utilization of rail cars. In its brief the Commission noted that car shortages on a nation-wide basis was a grave problem and that "the Commission's action here represents a determination to employ all rational and lawful means to attempt to alleviate the difficulty."

After extensive hearings the Commission found that: (1) the proposed charges do not apply in any instance where applicable line-haul rates plus the charge would exceed the maximum reasonable rates set forth in Grain and Grain

Products, 205 I.C.C. 301 (1934), 215 I.C.C. 83 (1936), (2) inspection of grain is no longer a mandatory requirement of federal law, (3) there is a need for inspection at some point in the grain marketing process, but inspection in-transit is not essential, and (4) grain inspection in-transit is an "accessorial" service for which a charge separate from the basic line-haul charges may be properly assessed. The Commission then found that the proposed charges were just and reasonable in that the railroads established by substantial evidence that the costs associated with in-transit inspection correspond to the level of the proposed charges and that delays resulting from in-transit inspection amount to more than three days per car. There is substantial evidence in support thereof.

The Commission recognized that the Western railroads were not presently assessing a charge in their line-haul rates for the first stop for inspection. The protestants here contend that under these circumstances the railroads could not segregate the inspection service and assign to it a separate charge without presenting substantial evidence that the new aggregate rate, composed of the line-haul plus inspection-transit rates, represent a just and reasonable rate for all of the services.

In its discussion and conclusions, the Commission found that: "A requirement that the reasonableness of the proposed charges cannot be determined without 'reference to the line-haul rates, the services furnished thereunder, and the cost thereof' effectively precludes respondents from ever establishing a separate charge for the accessorial first stop for inspection regardless of the need for such a charge. This inability was not present in the cited proceeding (Transit Charges, Southern Territory, 332 I.C.C. 664 [1968])—

However, there is a more significant distinguishing feature that persuades us that the prior decision is not controlling here. That difference is that the line-haul rate applicable to any movement of grain within the West when coupled with the proposed charge is less than the maximum reasonable level determined by this Commission." In its brief the Commission refers to the "extreme difficulty" involved in putting together thousands of such rates for the purpose of determining the reasonableness of a charge for a separate accessorial service. The Commission ultimately justified its rationale predicated upon the maximum level of rates which it established some 35 years ago in its Docket No. 17000 proceedings, Grain and Grain Products, *supra*.

While purporting to "distinguish" the instant decision from its prior decisions, the Commission *discovered* that which had been known for years: the maximum reasonable rates established in its Docket No. 17000 cases. This discovery suddenly became a "significant distinguishing feature" in its decision here.

There may be facts and circumstances justifying a Commission reversal to its well established rule that whenever a proposal is made for the establishment of an additional charge for a service that has been provided at the line-haul rates, the reasonableness of the proposed charge may not be divorced from the line-haul rates, the services thereunder, and the cost thereof. Transit Charges, Southern Territory, 332 I.C.C. 664 (1968); Grand Forks Chamber of Commerce, et al. v. Great Northern Railway Company, et al., 321 I.C.C. 356 (1963); Investigation and Suspension Docket No. 5146, Terminal Charges at Pacific Coast Ports, 255 I.C.C. 673 (1943); Unloading Lumber to New York Harbor, 256 I.C.C. 463 (1943); Reconsignment Case No. 3,

53 I.C.C. 455 (1919). The difficulty generated by the Commission's ruling here is that instead of repudiating its long established rule that it will not allow a separate charge for an accessorial service previously performed as part of the line-haul rates without substantial evidence that such an additional charge is justified measured against the overall services rendered and the overall reasonableness of the increased line-haul rate resulting therefrom — which may be legally justified — it has attempted to "distinguish" this case from its prior rulings. In our judgment the Commission has failed in this respect. In effect, the Commission "excuses" the respondent railroads in the case before us from meeting the substantial proof requirement in satisfaction of its long established rule predicated upon the rail carriers "inability" to meet that obligation here. In other words, the rule is viable and applicable where the Commission determines that the railroads are "able" to carry the burden of proof but it is not applicable in those instances where the Commission determines that the rail carriers are unable to do so. Such a departure is impermissible. Secretary of Agriculture v. United States, 347 U.S. 645, 74 S.Ct. 826, 98 L.Ed. 1015 (1954), is dispositive of this issue. There, as here, the Commission approved special charges, in addition to the existing line-haul rates, for unloading accessorial services. The protestants appealed contending that the service (a) is an essential part of the line-haul charge in that it relates to delivery, (b) that the line-haul rate encompassed the service and (c) that the service covered by the line-haul rate cannot be separately compensated unless the carriers show that the line-haul rate is inadequate to cover it. The Supreme Court held that each of these claims must be met by the Commission. The Court held that the Commisssion had not

done so and that it had failed to explain its departure from prior norms and its legal basis for doing so. See also William N. Feinstein & Company v. United States, 209 F.Supp. 613 (S.D.N.Y.1962); National Small Shipments Traffic Conference, Inc. v. United States, 321 F.Supp. 500 (S.D.N.Y.1970). The same reasoning applies here. The Commission in the case at bar did not "explain its departure" from its prior norm by its contention that this case can be "distinguished" on the apparent proposition that here the railroads were unable to marshal and present substantial evidence to meet the requirements of the norm. The Commission has unwittingly, we believe, adopted an evidentiary rule which is discriminatory per se: In those cases where the Commission determines that the carrier is able to meet the burden of proof that the separate charge is justificable in relation to its overall line-haul rates, it must do so; on the other hand, in those cases where the rail carrier is, in the judgment of the Commission, unable to carry the burden of proof, the separate charge will be approved if it does not exceed the "maximum reasonable rates" established in Grain and Grain products, *supra*.

We recognize that activities and conditions in dynamic fields may dictate that because of later developments prior administrative construction and interpretation of a statute should no longer be binding if it does not achieve general legislative objectives. National Broadcasting Company v. United States, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943). But a specific and long-standing administrative interpretation of a statute should not be overruled except for weighty reasons. Commissioner v. Estate of Sternberger, 348 U.S. 187, 75 S.Ct. 229, 99 L.Ed. 246 (1955). An administrative interpretive rule of long standing

has the same force and effect as a statute and rules of evidence apply to both in the same manner.

The Commission here noted that "even though the combined line-haul rate and the proposed charge does not exceed the prescribed maximum level, it is still incumbent on the Commission to determine if the separate charge is reasonable when related to the specific service for which it is to be assessed." 339 I.C.C. at 388. This, then, was a departure from its prior interpretive decisions.

We hold that the Commission has not adequately explained, for purposes of our review, its departure from prior norms. It has not sufficiently spelled out the legal basis of its decision. The Commission has not repudiated or overruled its prior decisions requiring that a carrier or carriers proposing separate and additional charges for accessorial services previously included within the line-haul rates may only do so if there is substantial evidence that the existing line-haul rates do not adequately cover the entire services. We are not convinced that the instant proceeding can be "distinguished" as the Commission has indicated. It does appear, however, that it has been distinguished by the commission predicated upon the Commission's own determination of the burden of proof which it will require and impose in variable quantities, at its discretion, on a case-to-case basis.

We do not believe that the findings of the Commission are adequate in relation to our obligations and tasks on review. We recognize, just as the Supreme Court recognized in Secretary of Agriculture v. United States, *supra*, that "the Commission was not precluded from following a procedure fairly adapted to the unique circumstances of this case." 347 U.S. at 652, 74 S.Ct. at 831.

The matter is remanded to the Commission for further proceedings consistent with this opinion. The proposed charges are suspended and shall be ineffective until and unless otherwise ordered by this Court.

ATCHISON, TOPEKA & SANTA FE RAILWAYS CO. et al. v. WICHITA BOARD OF TRADE et al.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. 72-214. Argued February 28, 1973—Decided June 18, 1973*

Mr. Justice Marshall announced the judgment of the Court, and an opinion in which The Chief Justice, Mr. Justice Stewart, and Mr. Justice Blackmun join.

We noted probable jurisdiction in these cases to resolve two important questions relating to the proper role of courts in reviewing approval by the Interstate Commerce Commission of proposed rate increases by railroads. 409 U.S. 1005 (1972). First, under what circumstances may a reviewing court find that the Commission has failed adequately to explain its apparent departure from settled Commission precedent? Because the problem of determining what policies an agency is following, as a prelude to determining whether the agency is acting in accordance with Congress' will, is a recurring one, this issue raises general problems of judicial review of agency action. The second question in these cases is a more limited one: in order to enjoin a proposed rate increase after a final order by the Interstate Commerce Commission, what sort of error must a District Court find in the proceedings of the Commission? We hold that in these cases the Commission did not explain its apparent departure from precedent in a manner sufficient to permit judicial review of its policies, but that, nevertheless, that kind of error does not justify the District Court in entering an injunction against imposition of the rates pending review of the Commission's action on remand. We therefore vacate the judgment of the District

*Together with No. 72-433, Interstate Commerce Commission v. Wichita Board of Trade et al., also on appeal from the same court.

Court and remand for the entry of a proper order.[1]

I

In these cases, the railroads proposed to establish a separate charge for inspection of grain while in transit.[2] In order to inspect the grain, the railroad cars loaded with it are stopped and placed on track facilities. A sample of the grain is taken, and the official grade is determined. Once the grade is known and the commercial value of the grain established, the shipper orders the car to proceed to the appropriate market. In-transit inspections have substantial advantages to shippers over inspection at the destination. If the grain were to be found to be of a different grade than expected only after arrival at the destination, sending it to another market might be quite expensive. The advantages of in-transit inspections to purchasers, instead of inspection at the source that might satisfy shippers, are less marked but are nonetheless significant. The grain might deteriorate while in transit, thus leaving the purchaser with grain of a lower quality than he expected. And the possibility of bias of the inspector is greater if the inspection is made at the source.

The Commission found that "the orderly marketing of grain under present practices requires that a substantial

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[1]We have previously stayed the judgment of the District Court on condition that appellant railroads keep accouts of the amounts received from the in-transit charges. 409 U.S. 801 (1972). We hereby direct the District Court to enter an order, consistent with this opinion, regarding the disposition of those amounts.

[2]Such a charge is already made for the first in-transit inspection in the eastern territory. The proposed rates would increase that charge from $7.42 to $14.33. There would be a slight increase in the currently effective charge for the second and sunsequent inspections. A large majority of the number of in-transit inspections occur in the western territory, where most of this country's grain is produced and where no separate charge is now made for the first in-transit inspection. Only a few cars are stopped for more than one inspection. Thus, for convenience of exposition, we treat this litigation as involving a proposal for a seperate new charge; that is the real effect of the railroads' proposal in most instances.

portion of the commodity moving in commercial channels must be subjected to some form of sampling and inspection to determine grade or quality." 339 I.C.C. 364, 385 (1971).[3] However, it also found that this sampling need not take place while the grain is in transit. The practice of in-transit inspections developed when federal law required inspections for the purpose of grading. 39 Stat. 483. But the diversion of grain from railroads to motor trucks made it difficult to enforce the inspection requirements. When trucks are used, in-transit inspections are not generally made. Thus, in order to simplify the movement of grain, Congress abolished the requirement of inspections. Pub. L. 90-487, 82 Stat. 761. In addition, the convenience of sampling at the source of the grain has increased with the widening reliance on low-cost mechanical samplers installed at grain elevators. The Commission therefore concluded that in-transit inspections were not necessary for the orderly marketing of grain.

It also concluded that in-transit inspections resulted in a substantial decrease in the number of freight cars available for general use.[4] Relying on a variety of studies conducted by the railroads, the Commission found that each inspection kept a freight car out of use for roughly three days, and that the cumulative impact of the delays due to in-transit inspection was to reduce the available freight car fleet by several thousand cars.

Finally, the Commission considered whether the proposed separate charge for each in-transit inspection fairly reflected the cost to the railroad of such an inspection. Again, it relied on quite detailed studies that established the cost of detaining a car, the cost of switching it on and off the

[3]The report of Division 2 of the Commission is found at 339 I. C. C. 364 (1971). The entire Commission "adopt[ed] and affirm[ed] the findings and conclusions reached" in that report. 340 I. C. C. 69, 70 (1971).

[4]For a description of the car-utilization problem, *see United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 745-746 (1972).

main line, and the clerical costs of conducting inspections. The Commission concluded that the proposed charges were "not excessive in amount. . . on the basis of the convincing evidence of record showing the costs sustained by the railroads in performing the in-transit inspection service." 340 I.C.C., at 71-72.

Shippers who had objected to the proposed new charges before the Commission sought review of the Commission's order, and a statutory three-judge District Court was convened. The District Court found that these conclusions were supported by substantial evidence, and they are not challenged here. But the District Court held that the Commission had not adequately justified its failure to follow "its long established rule that it will not allow a separate charge for an accessorial service previously performed as part of the line-haul rates without substantial evidence that such an additional charge is justified measured against the overall services rendered and the overall reasonableness of the increased line-haul rate resulting therefrom." 352 F. Supp. 368. The Commission, although it analyzed the cost of each in-transit inspection, had made no attempt to consider the reasonableness of continuing the existing line-haul rate, which included some charge for in-transit inspections. Instead, the Commission had attempted to distinguish this case from prior cases in which the rule was invoked, but the District Court, relying on *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954), was "not convinced that the instant proceeding can be 'distinguished' as the Commission has indicated." 352 F. Supp., at 369.

Although the Commission must be given some leeway to re-examine and reinterpret its prior holdings, it is not sufficiently clear from its opinion that it has done so in this case. A reviewing court must be able to discern in the Commission's actions the policy it is now pursuing, so that it may complete the task of judicial review—in this regard, to determine whether the Commission's policies are

consistent with its mandate from Congress. Since we cannot tell from the Commission's opinions what those policies are, we therefore agree with the District Court that the Commission's order finding the rates just and reasonable cannot be sustained.

II

Judicial review of decisions by the Interstate Commerce Commission in rate cases necessarily has a limited scope. Such decisions "are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power." *Manufacturers R. Co. v. United States*, 246 U.S. 457, 481 (1918).[5] As this Court has observed, "The process of rate making is essentially empiric. The stuff of the process is fluid and changing — the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems." *Board of Trade of Kansas City v. United States*, 314 U.S. 534, 546 (1942).

The delegation to the Commission is not, of course, unbounded, and it is the duty of a reviewing court to determine whether the course followed by the Commission is consistent with its mandate from Congress. See *ICC v. Inland Waterways Corp.*, 319 U.S. 671, 691(1943); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-169 (1962). Cf. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969) (opinion of Fortas, J.). But a simple examination of the order being reviewed is frequently insufficient to reveal the policies that the Commission is pursuing. Thus, this Court has relied on the "simple but fundamental rule of administrative law," *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), that the agency must set

[5]See also 5 U. S. C. § 706 (2).

forth clearly the grounds on which it acted. For "[w]e must know what a decision means before the duty becomes our to say whether it is right or wrong." *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 511 (1935). See also *Phelps Dodge Corp* v. *NLRB*, 313 U.S. 177, 197, (1941). And we must rely on the rationale adopted by the administrative process. Id., at 88. Cf. *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 443-444 (1965). Only in that way may we "guard against danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp.* v. *NLRB, supra*, at 194.

An agency "may articulate the basis of its order by reference to other decisions." *NLRB* v. *Metropolitan Life Ins. Co., supra*, at 443 n. 6. For "[a]djudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. See H. Friendly, The Federal Administrative Agencies 36-52 (1962). They generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified role of *stare decisis* in the administrative process, they may serve as precedents." *NLRB* v. *Wyman-Gordan Co., supra*, at 765-766 (opinion of Fortas, J.). This is essentially a corollary of the general rule requiring that the agency explain the policies underlying its action. A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress.

There is, then at least a presumption that those policies will be carried out best if the settled rule is adhered to. From this presumption flows the agency's duty to explain its departure from prior norms. *Secretary of Agriculture v. United States, supra*, at 653. The agency may flatly repudiate those norms, deciding, for example, that changed circumstances mean that they are no longer required in order to effectuate congressional policy. Or it may narrow

the zone in which some rule will be applied, because it appears that a more discriminating invocation of the rule will best serve congressional policy. Or it may find that, although the rule in general serves useful purposes, peculiarities of the case before it suggest that the rule not be applied in that case. Whatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate.

A further complication arises when, as here, the agency distinguishes earlier cases in which it invoked the rule. An initial step, and often the only one clearly taken, is to specify factual differences between the cases. Those factual differences serve to distinguish the cases only when some legislative policy makes the differences relevant to determining the proper scope of the prior rule. It is all too easy for a court to judge the adequacy of an asserted distinction in light of the policies the court, rather than the agency, seeks to implement; that is, after all, what an appellate court does with respect to courts of the first instance. Yet when an agency's distinction of its prior cases is found inadequate, the reviewing court may inadvertently adopt the stance it ordinarily takes with respect to other courts, and thereby may invade "the domain which Congress has set aside exclusively for the administrative agency." *SEC v. Chenery Corp., supra*, at 196, that is, the choice of particular actions to carry out the broad policies stated by Congress. Instead, it is enough to satisfy the requirements of judicial oversight of administrative action if the agency asserts distinctions that, when fairly and sympathetically read in the context of the entire opinion of the agency, reveal the policies it is pursuing. So long as the policies can be discerned, the court may exercise its proper function of determining whether the agency's policies are consistent with congressional directives.

These principles gain content when applied to the present cases. The District Court held that the Commission had not repudiated or adequately distinguished its prior cases establishing the rule that "it will now allow a separate charge for an accessorial service previously performed as part of the line-haul rates without substantial evidence that such an additional charge is justified measured against the overall services rendered and the overall reasonableness of the increased line-haul rate resulting therefrom." 352 F. Supp., at 368. While this is a fair summary of the Commission's establish practice,[6] it conceals the apparent purpose of the rule, to protect two distinct classes: shippers who will continue to utilize the accessorial service—in this case, those who will still have their grain inspected while in transit,-and shippers who will not. To decide whether the Commission has adequately explained its failure to follow that rule, we must consider each class in turn, for the

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[6]In *Transit Charges, Southern Territory*, 332 I. C. C. 664, 683 (1968), the Commission stated the ruie in these terms: "[T]he proposed charge may not be divorced from the line-haul rate, for both, insofar as transit is concerned, are inextricably interdependent. [Citations omitted.] While it would seem preferable to have the various elements entering into, and constituting, the whole analyzed, if indeed they could be separated, the entire transportation service rendered, including transit, must be examined in relation to the total rates and charges assessed." The District Court reviewing that case rephrased the rule: "The question here is what should the carrier be paid for a service which it has been rendering, and has been charging for, and has been paid for (one knoweth not what) which it proposes to separate and charge separately for. Both the courts and the Commission have consistently held that what is a just and reasonable rate for the service to be separated and charged for separately cannot be determined by examining only the typical questions of cost, etc., with respect to the separate service. On the contrary, the typical questions must be directed to the overall or combined picture so that one may conclude (a) that the rate for the separated service, looked at by itself in the light of the applicable questions, is just and reasonable; and (b) that the remaining rate for the services, sans the separated service, is not rendered unjust or unreasonable." *Cincinnati, N. O. & T. P. R. Co.* v. *United States*, Civil

Commission may have made clear why it need not protect one class by invoking the rule but it may nonetheless have failed to say why it need not protect the other class.

In *Unloading Lumber to New York Harbor*, 256 I.C.C. 463 (1943), the Commission dealt with a proposal to charge separately for unloading, a service that was inextricably bound up with the line-haul service. Cf. *Secretary of Agriculture v. United States*, *supra*, at 648-649. The Commission said, "It follows that respondents may not now segregate a component of that [line-haul] service, making a separate charge therefor, without an adequate showing that the aggregate charge for the through service is reasonable." 256 I.C.C., at 468. The explicit purpose of the rule in this situation is to guarantee that shippers receiving the same service that they had previously received do not pay an unreasonable amount. See also *Duluth Dockage Absorption*, 44 I.C.C. 300 (1917); *Terminal Charges at Pacific Coast Ports*, 255 I.C.C. 673, 682 (1943). The rule, in this regard, is that the railraods must demonstrate both that the proposed charge is reasonable in light of the costs of the separate service, and that the total charge for line haul plus the separate service is reasonable.

The Commission justified its departure from its prior case by giving two reasons that relate to this aspect of the rule. First, it noted that "[t]he line-haul rates applicable on the grain to, from, and through [the]inspection points number in the thousands and, because of the complexities of the

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Action No. 6992 (SD Ohio, Jan. 12, 1970), aff'd, 400 U. S. 932 (1970). The District Court continued, somewhat more obscurely: "Whether the examination is in terms of 'what portion of the line-haul rate represented the rate for the service to be separated,' or whether the search in terminology is for the answer to this question: Does the new aggregate rate, composed of line-haul plus transit rates represent a just and reasonable rate for all of the services (the aggregate of the served and the non-served)—the principle is the same." And in *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 654, (1954), this Court referred to it as "the prevailing rule...that a service necessarily encompassed by the line-haul rate cannot be spearately restated without examining the sufficiency of the line-haul rate to cover it."

grain rate structure, vary to a large degree." Thus, applying the general rule "effectively precludes respondents from ever establishing a separate charge for the accessorial first stop for inspection regardless of the need for such a charge." Second, the Commission said that "the line-haul rate applicable to any movement of grain . . . when coupled with the proposed charge is less than the maximum reasonable level determined by this Commission. In no instance will the combined rate and charge exceed the maximum level prescribed in *Grain and Grain Products* [205 I.C.C. 301 (1934) and 215 I.C.C. 83 (1936)]." 339 I.C.C., at 386-387.

The maximum rates prescribed in *Grain and Grain Products* have been subjected to a large number of general rate increases.[7] See, *e. g., Ex parte Nos. 265 and 267, Increased Freight Rates, 1970 and 1971,* 339 I.C.C. 125 (1971). In those proceedings, the Commission's focus is on the general revenue needs of the railroads. Across-the-board percentage increases are permitted without detailed examination of individual rates. As a result, there may be specific routes on which the maximum is in fact unreasonable, because, for example, the costs of operating those routes have not increased as rapidly as the costs elsewhere. Thus, the Commission has held that its approval of a general increase "does not have the effect of approving any particular increased rate as not being in excess of a maximum reasonable rate." *Coal from Illinois to Alton and East St. Louis,* 274 I.C.C. 637, 670 (1949). See also *Tennessee Produce & Chemical Corp.* v. *Alabama G.S.R. Co.,* 277 I.C.C. 207 (1950); *Brimstone R. Co.* v. *United States,* 276 U.S. 104 (1928). However, in other contexts, the Commission has treated the prescribed rates as modified by general increases as "the best evidence of the reasonableness

[7]Currently effective rates are, on almost every route, lower than the rates permitted by the general maximum. See 340 I.C.C., at 71. Often this results from competition from other modes of transport which forces rates below what the railroads would like to charge.

of corresponding rates on a...date" after the general increase. *Agsco Chemicals, Inc.* v. *Alabama G.S.R. Co.*, 314 I.C.C. 725, 733 (1961). Cf. *Public Service Comm'n of North Dakota* v. *Great Northern R. Co.*, 340 I.C.C. 739, 750 (1972).

The Commission thus has not determined that a rate which does not exceed the current general maximum is reasonable. A shipper can challenge any such rate as unreasonable and, if he succeeds, may recover reparations. In addition, the Commission may prescribe a rate to be charged in the future. 49 U.S.C. §§ 8, 9, 13(1), 15(1); *ICC* v. *Inland Waterways Corp.*, 319 U.S. 671, 687 (1943). In such proceedings, the shipper must show that the rate charged was unreasonable. Cf. *Louisville & N.R. Co.* v. *United States*, 238 U.S. 1 (1915); *Shaw Warehouse Co.* v. *Southern R. Co.*, 288 F. 2d 759 (CA5 1961).[8] In contrast, when a proposed rate increase is challenged by a shipper before it goes into effect, "the burden of proof shall be upon the carrier to show that the proposed changed rate... is just and reasonable." 49 U.S.C. § 15(7).[9]

The Commission in this litigation referred to the burden

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[8]MR. JUSTICE WHITE argues that, if a rate at the level of the general maximum is reasonable, and if the separate charge is reasonable, then surely a line-haul rate that is equal to the general maximum less the separate charge is reasonable. The flaw in his argument is that the Commission has never determined that rates at the level of the current general maximum are reasonable. That is, in the example suggested by MR. JUSTICE WHITE, the Commission has not determined what he says that it has "previously found — that 120 is a reasonable charge for both services." Without this premise, his argument fails.

[9]If the Commission finds that the proposed rates are unreasonable, rather than that the railraods failed to carry their burden of proof, that finding might be conclusive in a subsequent proceeding. Cf. *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U.S. 247, 258 (1913); *ICC* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576, 590-594 (1966). This does not, however, affect the burden placed on carriers in the suspension proceedings.

that applying the rule would place on the railroads. It rather clearly intended by this to suggest that the importance of implementing the new charges and so of increasing the supply of available freight cars justified some modification of its usual allocation of the burden of going forward. Instead of requiring the railroads to produce substantial evidence that the total charges were reasonable, it would leave that determination to later proceedings in which a shipper seeking reparations might point to particular individual charges as unreasonable.

If this were all that was at stake, the Commission would have adequately identified the concerns behind its course—in light of the pressing need to increase the freight car supply, it was not too much to require that shippers carry the burden of going forward. Such an assessment would surely permit a reviewing court to determine whether the Commission's action was consistent with congressional transportation policy. Unfortunately, though, the change involved in making the shippers claim that particular rates are unreasonable is not all that is at stake. For in proceedings for reparations, there is also a change in the burden of proof: the shipper must produce substantial evidence that the rate is unreasonable. This would appear to affect the likelihood that the shipper will prevail. There is a zone in which rates are reasonable, *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 506 (1935), and it would seem to be harder to establish that the proposed rates fell outside that zone than that they fell within it. Or so Congress believed, for it specified the allocation of the burden of proof in suspension proceedings as part of the cost to the carriers; in return for confining the power to suspend rates to the Commission, and so of eliminating the threat of long-drawn-out injunctive proceedings in the courts, Congress made the carriers carry a burden of proof that would otherwise not have been

theirs. Cf. Part III, *infra*.[10]

The Commission did not suggest that its approval of the proposed rates on the grounds it gave would alter the usual practice in actions for reparations. Nor did it say why the need for an increased supply of freight cars justified a significant change in the burden of proof. In this sense, the Commission's action was, as the District Court noted, "discriminatory per se."

It is even harder to understand from the Commission's opinion why it departed from the rule in prior cases protecting shippers who decide not to have in-transit inspections. If the separate charges are to be effective in alleviating the car-shortage problem, there must be a substantial number of shippers who do not seek in-transit

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[10]The argument urged in support of the Commission's order is, in essence, that the separate charge approved by it was just like a general rate increase because of the breadth of its application. However, the Commission did not use the language characteristic of general increase proceedings. See, *e. g., Ex parte 259, Increased Freight Rates, 1968*, 332 I. C. C. 714, 715, 792 (1969). And, if this were just like a general rate increase, serious questions would arise about the jurisdiction of the District Court to review the Commission's order. See *Atlantic City Electric Co.* v. *United States*, 306 F. Supp. 338 (SDNY 1969); *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 (DC 1969), both aff'd by an equally divided court, 400 U. S. 73 (1970). Yet, although the parties have cited those cases to us, see Brief for the Interstate Commerce Commission 35; Brief for the Secretary of Agriculture 18; Brief for Wichita Board of Trade 32, they have not contended at any length that the District Court lacked jurisdiction over this litigation. This suggests that the parties, including the Commission, do not interpret the Commission's opinion as resting on the similarity between these cases and general rate increase cases.

inspections. Yet according to the Commission, the railroads need not show that the present line-haul rates are reasonable charges for the services provided to shippers who do not seek in-transit inspections. I would appear, thus, that the Commission has approved a policy that discriminates against what it hopes will be a very large number of shippers; it seems to have tried to justify its policy by citing reasons that affect only a much smaller class.

Some of the shippers who previously sought in-transit inspections will no longer do so. Others had the opportunity for such inspections. Now the railroads propose to eliminate some of the service previously provided, yet charge the same rates. The Commission in its prior cases has required railroads proposing a similar reduction in service either to show that the rates then in effect did not compensate them for the service, and thus that the service was being provided at no charge, or to reduce the existing rates. See, *e. g., Transit Charges, Southern Territory*, 332 I.C.C. 664, 683 (1968); *Loading of Less-Than-Carload Freight on Lighters in Norfolk, Va., Harbor*, 91 I.C.C. 394 (1924); *ICC v. Chicago, B. & Q. R. Co.*, 186 U.S. 320 (1902).

Nothing the Commission said suggests any reason why the railroads should not be required to follow the same rule in this case. At no time have rates ever been established, or found just and reasonable, when the railroads did not include the service of in-transit inspection. Perhaps the imperative need to increase the number of freight cars available to all shippers justifies some alteration of the general rule. Yet the Commission, when dealing with shippers who will continue to have in-transit inspections, invoked the fact that the new charges would not raise rates above those permitted by the general maximum. As to that class, the Commission apparently believed that it could not simply refuse to follow pre-existing practices on the ground of exigency alone. The Commission offered no reason to distinguish the larger class from the smaller one, in that respect. But it might be that rates for services including an in-transit inspection, at the level of the general maximum, would be reasonable while rates for services without such inspections would be unreasonable at that level, or even below it. Thus, the fact that the new charges will not exceed the general maximum seems to have no bearing on the question of the reasonableness of the rates that will continue to be in force for now-reduced services.[11]

Perhaps the current line-haul rates really do not include a substantial amount attributable to the cost of providing in-transit inspections. But cf. Tr. 231-232, 258-266. Or perhaps the Commission has some reason to reinterpret the prior cases suggesting that its rule reflects a concern for rates that are "increased" simply because of a reduction in services.

As in *Secretary of Agriculture v. United States*, 347 U.S. at 652, the Commission may have reasons for "following a procedure fairly adapted to the unique circumstances of this

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[11]The Commission may have intended to leave this question for later proceedings. But this course runs into the difficulties noted *supra*, at S13-S14.

case."[12] But, as in that case, it must make these reasons known to a reviewing court with sufficient clarity to permit it to do its job. Even giving the Commission's opinion the most sympathetic reading that we find possible, we cannot discover in it an expressed reason for permitting the railroads to reduce their services without showing that the rates they propose to maintain are reasonable rates for the service they intend to provide.

III

After holding that the matter must be remanded to the Interstate Commerce Commission for further proceedings, the District Court ordered, "The proposed charges are suspended and shall be ineffective until and unless otherwise ordered by this Court." No reasons for such an order were given; the District Court did not, for example, specify the nature of the harm to the shippers that would, presumably, injure them irreparably. Nor did it explain the basis for its apparent belief that *Arrow Transportation Co. v. Southern R. Co.*, 372 U.S. 658 (1963), was distinguishable.

It was error to enter such an injunction. The District Court clearly had power to suspend the operation of the Commission's order pending the final determination of the shippers' suit. That power is given in terms by 28 U.S.C. §2324: "The pendency of an action to enjoin, set aside, annual, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation

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[12]On remand, the Commission might explain more fully the course it followed, or it might adopt a different course, for example, by requiring the carriers to demonstrate the reasonableness of the line-haul rates for services provided without an in-transit inspection on a representative sample of routes. Most of the prior cases in which the Commission invoked the rule involved quite limited problems, often confined to a single route. But cf. *Transit Charges, Southern territory*, 332 I. C. C. 664 (1968). If the Commission then explained why that procedure was responsive to the needs of the particular case, the prerequisites of judicial review would be satisfied.

of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action." But an injunction forbidding the railroads to implement a proposed change in rates is not, strictly speaking, an injunction suspending the Commission's order. In this case, for example, the Commission's order stated that "the proposed new or increased charges for in-transit inspection of grain at various points in the United States are just and reasonable..." 340 I.C.C., at 74. The only consequence of suspending that order is that the railroads may not rely, in some subsequent proceeding, on a Commission finding that the proposed rates were just and reasonable. In an action for reparations, for example, the railroads could not gain any benefit from the purported Commission approval of the increases.[13] See *Arizona Grocery v. Atchison, T. & S. F. R. Co.*, 284 U.S. 370 (1932). See also 49 U.S.C. §§1(5), 10 (1). The Commission's order also provided that the proceeding be discontinued, and suspension of the order requires the Commission to reopen its inquiry.

Carriers may put into effect any rate that the Commission has not declared unreasonable. 49 U.S.C. §§ 6 (3), 15 (1) Suspension of the Commission's order thus does not in itself preclude the carriers from implementing a new rate. The power conferred on the District Court by § 2324 does not in itself include a power to enjoin the railroads from implementing a proposed new charge. Rather, that power must be considered as at best ancillary to the general equitable powers of the reviewing court, and protective of its jurisdiction. See *Arrow Transportation Co. v. Southern R. Co., supra*, at 671 n. 22; *Order of Conductors v. Pitney,*

[13]The Commission may, of course, approve the rates on a theory similar to that discussed in Part II of the opinion, justifying its refusal to require a showing of reasonableness by the fact that questions would be open in subsequent proceedings. A suspension of the Commission order would then have almost no practical meaning.

326 U.S. 561, 567 (1946). Cf. *Pittsburgh & W. Va. R. Co.* v. *United States*, 281 U.S. 479, 488 (1930); 28 U.S.C. §1651 (a). As this Court noted in *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4 (1942), such a power must be inferred from Congress' decision to permit judicial review of the agency action. "If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made." *Id.*, at 10.

Yet it would be surprising if that power could be exercised to the extent that it might substantially interfere with the function of the administrative agency. "The existence of power in a reviewing court to stay the enforcement of an administrative order does not mean, of course, that its exercise should be without regard to the division of function which the legislature has made between the administrative body and the court of review." *Ibid.* Proper regard for that division of function requires that we hold erroneous the District Court's decision to enjoin not only the Commission's order finding the proposed rates just and reasonable but also the implementation of those rates.

In *Arrow Transportation Co.* v. *Southern R. Co., supra*, this Court considered a similar problem. The Interstate Commerce Commission has the power to suspend proposed rate changes for seven months, while it proceeds to consider the reasonableness of the proposal. "If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate...shall go into effect at the end of such period." 49 U.S.C. § 15 (7). In *Arrow*, parties affected by proposed reductions sought an injunctions against the implementation of the proposed reductions when, at the end of the suspension period, the railroads announced that they intended to put the new rates into effect. The Commission had not determined that those

rates were reasonable. The Court concluded that Congress, by giving the Commission the power to suspend rates, had intended to preclude the courts from doing the same.

Here, of course, the Commission's proceeding has been concluded, or at least so the Commission thought when it entered its order. The terms of § 15(7) do not specifically govern this situation. Nor is there any other provision in the relevant statutes depriving federal courts of their general equitable power to preserve the status quo to avoid irreparable harm pending review. Yet many of the considerations, relied on in *Arrow* and influencing this Court's definition of the proper relation between the courts and the Interstate Commerce Commission, must be drawn on to delineate guidelines for the exercise of the ancillary power, in a proceeding to review a Commission order, to enjoin a rate increase pending final determination of the suit.

The most important of these considerations is the group of policies that are encompassed by the term "primary jurisdiction." National transportation policy reflects many often-competing interests. Congress has established an administrative agency that has developed a close understanding of the various interests and that may draw upon its experience to illuminate, for the courts, the play of those interests in a particular case. Cf. *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285 (1922); *United States* v. *Western Pacific R. Co.*, 352 U.S. 59 (1956). Ordinarily, then a court should refrain from expressing a preliminary view on what national transportation policy permits, before the ICC expressees its view. But when a court issues an injunction pending final determination, one important element of its judgment is its estimate of the probability of ultimate success of the merits by the party challenging the agency action. *Virginia Petroleum Jobbers Assn.* v. *FPC*, 104 U.S. App. D.C. 106, 110, 259 F. 2d 921, 925 (1958). Depending on the type of error the reviewing

court finds in the administrative proceedings, the issuance of an injunction pending further administrative action may indicate what the court believes is permitted by national transportation policy, prior to an expression by the Commission of its view. This is precisely what the doctrine of primary jurisdiction is designed to avoid. Cf. *Order of Conductors* v. *Pitney, supra; Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U.S. 528, 533 (1960). The fact that issuing an injunction may undercut the policies served by the doctrine of primary jurisdiction is therefore an important element to be considered when a federal court contemplates such action.[14]

As we have indicated in Part II of this opinion, we require the agency to justify its departure from its prior decisions so that we may understand what policies it is pursuing. If a reviewing court cannot discern those policies, it may remand the case to the agency for clarification and further justification of the departure from precedent. But an injunction pending the completion of those proceedings would be warranted only if the reviewing court entertained substantial doubt about the consistency of the Commission's action with its mandate from Congress. Cf. *Virginian R. Co. v. United States*, 272 U.S. 658, 673 (1926).[15] When a case is remanded on the ground that the

[14] *Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U. S. 528 (1960), shows that not all judicial injunctions infringe on an agency's primary jurisdiction. There the Court noted that the District Court's "examination of the nature of the dispute is so unlike that which the [agency] will make of the merits of the same dispute, and is for such a dissimilar purpose, that it could not interfere with the later consideration of the grievance by the [agency] will make of the merits of the same dispute, and is for such a dissimilar purpose, that it could not interfere with the later consideration of the grievance by the [agency]." *Id.*, at 534. Here, in contrast, the District Court must consider whether the Commission is likely to find reasons for its action that are consistent with congressional policy. Not only is such a question exceedingly complex, it is also just what the Commission itself must decide before approving the proposed new charges.

[15] In some cases, the reviewing court might explicity refrain from considering the likelihood of success on the merits in deciding whether

agency's policies are unclear, an injunction ordinarily interferes with the primary jurisdiction of the Commission.[16] *Cf. Arrow Transportation Co. v. Southern R. Co.*, U.S., at 669-670.

In addition, the reviewing court must consider whether

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or not to issue an injunction. The, if the possibility of irreparable damage to the party seeking review or to other interests is great enough, an injunction may perhaps be justified.. See, *e.g., Semmes Motors, Inc.* v. *Ford Motor Co.*, 429 F. 2d 1197, 1205-1206 (CA2 1970); *Checker Motors Corp.* v. *Chrysler Corp.* 405 F 2d 319, 323 (CA2 1969). Here, however, the District Court did not clearly refuse to access the likelihood of ultimate success and, as indicated *infra*, the possibility of irreparable harm to the shippers is quite small.

[16]This analysis turns on the fact that the type of error in these cases involves precisely a failure by the Commission to do the job committed to it, the proper performance of which is a predicate of the doctrine of primary jurisdiction. Where the error might be considered purely procedural, for example where the Commission failed to consider relevant evidence on grounds the reviewing court finds inadequate, the issuance of an injunction might not interfere with the agency's primary jurisdiction quite so severly. Yet even there, before issuing an injunction the reviewing court must consider whether the Commission would have come to a different conclusion had it considered the evidence. And that may sometimes impinge on the sphere committed to the Commission for initial decision.

This Court has distinguished between blatantly lawless action and mere procedural error in cases raising similar questions of the power of courts to intervence in administrative action. See *Oestereich* v. *Selective Service Bd.*, 393 U. S. 233 (1968); *Fein* v. *Selective Service System*, 405 U. S. 365 (1972).

Different considerations would come into play, too, when the reviewing court finds some failure by the carriers in the suspension proceeding, rather that a failure by the Commission to do its task. A reviewing court might find, for example, that the Commission's conclusion that the carriers had carried the burden of proof to justify the increase was not supported by substantial evidence. Although phrased as a finding of administrative error, that in fact relates to the presentation of evidence by the carriers.

Finally, this litigation involves only claims under the Interstate Commerce Act. Subsequent legislation might affect the relation between court and agency and so the propriety of injunctive relief. Whether it does so must be determined by examining that legislation.

irreparable harm will result if the injunction is not issued and the party seeking it prevails on the merits. *Order of Conductors v. Pitney, supra.* That too may interfere with the agency's primary jurisdiction. We deal here with a dispute between shippers and carriers. In giving the Interstate Commerce Commission power to suspend proposed rate increases, Congress allocated the benefit and harm of a suspension. For a period of up to seven months, the carriers may not collect the increases if the Commission suspends them. The income that they might have gained is lost to them forever. Congress did provide protection to shippers for the period after the rates go into effect. The Commission may require the carriers to keep detailed accounts of the income received as a result of the increase. If the increase is ultimately found unjustified, the Commission may order a refund. 49 U.S.C. § 15(7). Even if the Commission does not do so in a suspension proceeding, the shippers may recover reparations under some circumstances. 49 U.S.C. §§8, 9. Thus, it is often quite unlikely that shippers will be irreparably damaged by the implementation of a rate increase.[17]

There are, however, public interests at stake in this litigation, as well as the private interests of the shippers and carriers. The Commission found that inspection of grain is required for the orderly marketing of grain. 339 I.C.C., at 385. Inspections will thus continue to be made. But now if the Commission ultimately approves the new charges, there will be a separate charge for them, either by the railroads under the new charges, or by someone else engaged in marketing grain. This extra cost must be absorbed by someone, perhaps by farmers, perhaps by the ultimate

[17]The interests of other carriers who might object to a proposed rate change are somewhat different. They are not damaged, as the shippers are, by out-of-pocket expenditures, and refunds or reparations do not remedy the loss of business that they might suffer. This factor would thus have less weight in suits by such carriers, although the problem of interfering with primary jurisdiction must still be considered.

consumers of grain. See Tr. 1299. The impact of rates on various groups in this country is surely relevant to deciding that the rates are consistent with national transportation policy.

But the public interest is not a simple fact, easily determined by courts. Here, for example, the interests of farmers and consumers of grain must be balanced against the interests of producers and consumers of all sorts of other goods shipped by rail. For the premise of the Commission's action in this case was that separate charges for in-transit inspections would alleviate the freight-car shortage. The shortage itself increases the cost of transporting a wide range of products by rail. Thus, the decision that must be made is whether the car shortage has a more significant impact on the national economy that does increased cost for grain products. Congress has committed that decision to the Interstate Commerce Commission in the first instance, and the extent of harm to farmers and consumers of grain cannot be estimated without interfering with the primary jurisdiction of the Commission.[18]

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[18]Although they are far less substantial than the problems of primary jurisdiction and irrepable injury, procedural problems might also arise when a district court consideres a request for an injunction like that issued here. Review of Commission orders is by a three-judge district court. The United States is the difendant. 28 U. S. C. §§2321, 2322. Railroads which appeared before the Commission have a right to intervene, 28 U. S. C. §2323, but they need not do so. If a railraod chose not to intervene, the district court could not enjoin it from implementing the new charge. The plaintiffs could, of course, compel an unwilling railroad to appear. Fed. Rule Civ. Proc. 19(a). But, even though services of process is nationwide, 28 U. S. C. §2321, some plaintiffs might find it difficult to serve every railraod that did not appear willingly. The presence before the reviewing court of all interested parties, or only some of them, is therefore relevant to the exercise of the court's discretion to enjoin a proposed rate increase. Like the other factors discussed in the opinion, this does not establish that the district court lacks power to enjoin the implementation of proposed rate increases after a final Commission order, but it is a factor to be considered in determining whether to exercise equitable discretion to issue such an injunction.

As this discussion shows, it is very likely that a decision to enjoin rates pending reconsideration by the Commission in order to clarify its policies will imply some view by the District Court about decisions committed to the Commission by the doctrine of primary jurisdiction. The District Court's power to enjoin rates, in order to protect its jurisdiction to review Commission orders, must therefore be exercised with great care and after full and detailed consideration of the problems set out above. It will not do to enter such an injunction in the off-hand manner of the District Court. Cf. *Virginian R. Co. v. United States*, 272 U.S. 658 (1962). Here the District Court could not consider the likelihood of success on the merits or where the public interest lies without infringing on decisions committed by Congress to the primary jurisdiction of the Interstate Commerce Commission and the possibility of harm to the shippers was small. It was therefore improper to enter an injunction against the implementation of the proposed new charges.

Here the Commission ordered the railroads to maintain records of the amounts collected as a result of the new charge. It may be that this adequately protects the shippers from irreparable damage, in light of the availability of actions for reparations. The Commission may determine on remand that some further steps must be taken to protect the shippers. But in any event, it is clear that the District Court should not have entered the injunction it did. The action of the District Court is affirmed as to the remand to the Commission and is reversed as to the injunction suspending the proposed charges.

So ordered.

Mr. Justice Powell took no part in the consideration or decision of these cases.

Mr. Justice Douglas, concurring in the affirmance of the remand to the Commission and dissenting from the reversal of the decree authorizing the injunction.

Though I concur in the affirmance of the remand to the Interstate Commerce Commission, I dissent from the reversal of the decree authorizing the injunction, since in my view the District Court was quite correct in issuing its injunction. *Arrow Transportation Co. v. Southern R. Co.*, 372 U.S. 658, is not relevant here, for the reason that 49 U.S.C. § 15(7) only purports to control the suspension of rates up until the time the Commission has rendered a decision. After that decision has been made, the reviewing court has, I believe, the power to enjoin the affected rates. The new charges which the Commission would impose would have an immediate impact upon the grain-marketing system. It would affect the volume of business of the grain merchants, it would affect the employment of grain inspectors, and it would result in lower prices being paid to the farmers. None of these incidences can be remedied under the existing statutory scheme, because none of these interests is enabled to bring suit for a later rate refund. Hence, in my view, the grain trade and the farmers need this interim protection lest in inspection the marketing system suffer severe attrition during the period of remand. The deciding principle is that the District Court sits as a court of equity, *United States v. Morgan* 307 U.S. 183, 191, and as a court of equity has, I believe, ample power to protect the grain market nationally which would otherwise be without remedy under the existing statutory regime.

Jurisdiction is granted the District Court "to enforce, enjoin, set aside, annul or suspend" any order of the Interstate Commerce Commission. 28 U.S.C. § 1336 (a). For years, the type or order here involved* was not reviewable. See *Procter & Gamble Co. v. United States*, 225 U.S. 282. But that "negative" order concept was abandoned in *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 145. The provisions of 28 U.S.C. § 1336 (a), are an explicit grant

*The order of Division 2 of the Commission provided that the proceeding "be, and it is hereby, discontinued." 339 I. C. C. 364, 401. The order of the Commission en banc affirming is in 340 I. C. C. 69, 74.

of power to provide injunctive relief. Under that Act the "governing principle" is "that it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all — including the public — whose interests the injunction may affect." *Inland Steel Co. v. United States*, 306 U.S. 153, 157. That power exists whether the Commission's authority over rates is challenged under 49 U.S.C. § 15 (1) as being unjust or unreasonable or under 49 U.S.C. § 15 (7) relating, as here, to "a new individual or joint rate, fare, or charge." In all cases the District Court by reason of 28 U.S.C. § 1336 (a) sits as a court of equity.

Mr Justice White, with whom Mr. Justice Brennan and Mr. Justice Rehnquist join, concurring in the reversal of the injunction and dissenting from the affirmance of the remand to the Commission.

I dissent because the District Court erred both in holding that the Commission had inadequately explained the basis for its judgment and in suspending the new in-transit inspection tariff beyond the time the statute permits new rates to be suspended without a finding that they are unjust and unreasonable.

As to the latter, 49 U.S.C. § 15 (7) forbids the suspension of new freight rates for more than seven months without the requisite finding of unreasonableness by the Commission. Only the Commission may suspend in the first instance; and if the agency refuses to do so, the court is powerless itself to suspend. The Commission may postpone effectiveness of new rates for seven months, but if it does, the statute commands that, absent the appropriate order of the Commission within that period, "the proposed change of rate . . . shall go into effect. . . ." To permit the District Court nevertheless to extend this period seems to me to be flatly contary to the will of Congress. I therefore cannot agree that, although the District Court has no statutory power to do so, it nevertheless retains sufficient power to enjoin the rates as "ancillary to the general equitable powers of the reviewing

court, and protective of its jurisdiction." *Ante*, at 819. As I see it, the District Court contravened the precepts of *Arrow Transportation Co. v. Southern R. Co.*, 372 U.S. 658 (1963).

As for the remand to the Commission, there is somewhat more to be said. The Commission found, and it is not questioned by the District Court or by the majority here, that in-transit inspection of grain is not an essential part of transportation service but only ancillary to it; that the premarketing inspection of grain, in transit or otherwise, is no longer required by federal law; that in-transit inspection of grain has been the regular practice in Western territory, to some extent the practice in Southern territory, but not in Eastern territory; that the line-haul rates for grain in Western and Southern territories established by the railroads or prescribed by the Commission have provided one free in-transit inspection stop, but a separate charge for that service is the practice in Eastern territory; [1] and that, because of recent developments in-transit inspection is no longer an essential service for the orderly marketing of grain in Western and Southern territories. Furthermore, the unquestioned finding of the Commission was that the principal motivation for imposing a separate charge for in-transit grain inspection was not to increase railroad revenues through collection of the charge itself but to

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[1] The Commission noted:

"It is again emphasized that the major impact of the proposal under consideration will be on the movement of grain in the western district. Most inspections occur in this territory. There is presently effective a spearate charge for this service in the East. A sunstantial increase in those charges will result, however, it the proposed charges are permitted to become effective. The number of in-transit inspections in the South is limited and take place chiefly at the ports on export grain tonnage. There is little, if any, opposition to establishment of the charges in southern territory. Practically all of the controversy is concerned with establishment of the separate charge for the first inspection of grain within the western district." 339 I. C. C. 364, 385.

promote efficient utilization of freight cars by discouraging the practice of in-transit inspection which had proved extremely wasteful in terms of car utilization. The Commission finding, also undisturbed, was that the separately stated inspection fee would discourage the practice of in-transit inspection, would contribute to a more efficient utilization of freight cars, and hence help relieve the unquestioned grain-car shortage.

With, these important preliminary findings and conclusions behind it, the Commission examined in detail the reasonableness of the separate charge being imposed for in-transit inspection of grain. Its conclusion was that the charge was reasonable, a judgment not overturned either here or in the District Court. Finally, the Commission noted that by the terms of the new tariff itself, separate in-transit inspection charges could not be collected where the combination of the new, separate charge and the existing line-haul rate exceeded the maximum reasonable level of grain rates established in Docket 17,000, pt. 7, *Grain and Grain Products*, 205 I.C.C. 301 (1934); 215 I.C.C. 83 (1936), as raised by subsequent general revenue increases. Docket 17,000, pt. 7, *Rate Structure Investigation*, was a major national effort, a comprehensive investigation of rates on agricultural products, and resulted, among other things, in the Commission's prescribing maximum reasonable freight rate levels for movements of grain. Since that time, there have been general rate increases for revenue purposes, in the course of which the rates on grain and their structure as required by the 1934 and 1936 determinations have been given special attention. See, for example, *Increased Freight Rates, 1967*, 332 I.C.C. 280, 300 (1968).

Under the new tariffs now filed, as I have said, if the applicable line-haul rate on the particular grain movement involved is at the maximum reasonable level theretofore prescribed by the Commission in previous proceedings, no separate in-transit inspection charge is imposed or

allowable, nor may the combination of the new charge and the existing line-haul rate collected by the railroad exceed the maximum allowable rate as previously determined. This is the key to understanding that, in approving the separate inspection charge, the Commission did not ignore its longstanding rule that railroads may not impose separate charges for an ancillary service previously furnished under a line-haul rate unless both the reasonableness of the separate charge and the line-haul rate are scrutinized. *Transit Charges, Southern Territory*, 332 I.C.C. 664, 683-684 (1968), is, for example a relatively recent restatement of the rule.[2] The Commission thought this rule not controlling here because, in the first place, the magnitude of the task of justifying each one of a countless number of line-haul grain rates would, as a practical matter, prohibit the imposition of a separate in-transit inspection charge and so frustrate the important nonrevenue goal of discouraging in-transit inspection and so improving car utilization.

But, more fundamentally, the Commission in any event deemed the rule satisfied; for here the reasonableness of the line-haul rate was sufficiently examined and ensured by proof that the new charge was itself reasonable *and* by prohibiting its collection if the total cost of the grain movement—its line-haul charge plus the separate inspection charge—exceeded the maximum reasonable rate theretofore prescribed by the Commission, that is, the maximum reasonable rate the Commission had *theretofore prescribed for both the transportation service and the privilege of in-transit inspection.*

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[2]The Commission's order was sustained, on other grounds, in *Cincinnati, N. O. & T. P. R. Co. v. United States*, Civil Action No. 6692 (SD Ohio, Jan. 12 1970), aff'd. 400 U.S. 932 (1970). The District Court sustained the Commission on the basis that the proposed increase in charges might well result in a substantial diversion of the considered traffic, with a diminution, rather than an increase, in revenues. In the present case, the Commission noted: "Similar conclusions are not warranted here."

This approach seems straighforward and adequate. Keeping in mind that Docket 17,000, Part 7, as was customary in Western territory, prescribed rates for grain movements permitting one in-transit inspection without extra charge, let us assume, for example, that the maximum rate prescribed by the Commission for a particular grain movement with in-transit inspection privileges was 120. Assume further what is the recurring situation in the case before us—that the railroad is charging less than it may, say 100, for the grain movement with that privilege. The railroad then publishes a tariff under which the line-haul rate of 100 no longer entitles the shipper to in-transit inspection, and a separate charge of 20 is imposed on those who want that service. The line-haul charge plus the separate in-transit inspection charge does not exceed what the Commission has heretofore ruled the railroad may collect for both the transportation and the inspection service. This calculus seems to me an adequate basis for concluding that the line-haul rate of 100 is itself within the zone of reasonableness. If a railroad may charge 120 for a grain movement with in-transit inspection provided, and the inspection stop is proved reasonably worth 20, why should there also be occasion for considering the reasonableness of 100 as a line-haul rate and so proving again what the Commission previously found—that 120 is a reasonable charge for both services?

The District Court thought the Commission ignored *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954), but I read that case far differently. There the Court, although being of the opinion that the Commission had not adequately explained why it was approving a separate charge without examining the legality of the line-haul rate, was careful to point out that the Commission was not precluded "from following a procedure fairly adapted to the unique circumstances of this case"; nor did the Court question "the Commission's power, under appropriate

findings, to approve such unloading charges without pursuing one of these courses. In dealing with technical and complex matters like these, the Commission must necessarily have wide discretion in formulating appropriate solutions." *Id.*, at 652. That case does not stand for the rule that a separate charge for an ancillary service may in no circumstances be permitted without new proof in *that* proceeding of the reasonableness of the line-haul rate.

The prior decisions of the Commission relied upon by the District Court establish clearly enough that the Commission must be satisfied with the reasonableness of the line-haul rate as an exaction for the remaining services before approving a separate charge for a service previously covered by the line-haul rate. *Transit Charges, Southern Territory, supra; Terminal Charges at Pacific Coast Ports*, 255 I.C.C. 637 (1943); *Reconsignment Case No. 3*, 531.C.C. 455 (1919); *Loading of Less-Than-Carload Freight on Lighters in Norfolk, Va., Harbor*, 91 I.C.C. 394 (1924). In these cases, the carriers simply failed to carry their burden of proof.

The District Court also cited for this proposition *Grand Forks Chamber of Commerce v. Great Northern R. Co.*, 321 I.C.C. 356 (1963), but the Commission in that case, see *id.*, at 360-362, did precisely what it has done in this one: it approved a separate in-transit inspection charge in the case of so-called Group 3 rates where the line-haul rate and the new charge together were less than so-called Group 1 rates prescribed in *Grain and Grain Products*, 205 I.C.C. 301 (1934); 215 I.C.C. 83 (1936). See also *Public Service Comm'n of North Dakota v. Great Northern R. Co., 340 I.C.C. 739 (1972); Alabama State Docks Dept. v. Alabama, T. & N. R. Co.*, 321 I.C.C. 347 (1963); *Agsco Chemicals, Inc. v. Alabama G. S. R. Co.*, 314 I.C.C. 725 (1961).

Neither do I understand why the majority is comforted by the opinion in *Cincinnati N. O. & T. P. R. Co. v. United States*, Civil Action No. 6992 (SD Ohio, Jan. 12, 1970), in

which the District Court affirmed, but on very limited grounds (grounds that would save the cases before us now), the Commission's disallowance of a separate transit charge for cotton movements but disapproved the stringent standard by which the Commission required the railroads to prove the reasonableness of the resulting line-haul rate. The District Court restated the prevailing rubric:

> "The question here is what should the carrier be paid for a service which it has been rendering, and has been charging for, and has been paid for (one knoweth not what) which it proposes to separate and charge separately for. Both the courts and the Commission have consistently held that what is a just and reasonable rate for the service to be separated and charged for separately cannot be determined by examining only the typical questions of cost, etc., with respect to the separate service. On the contrary, the typical questions must be directed to the overall or combined picture so that one may conclude (a) that the rate for the separated service, looked at by itself in the light of the applicable questions, is just and reasonable; and (b) that the remaining rate for the services, sans the separated service, is not rendered unjust or unreasonable."

The District Court continued:

> "Whether the examination is in terms of 'what portion of the line-haul rate represented the rate for the service to be separated,' or whether the search in terminology is for the answer to this question: *Does the new aggregate rate, composed of line-haul plus transit rates represent a just and reasonable rate for all of the services (the aggregate of the severed and the nonsevered)—the principle is the same.*" (Emphasis added.)

A few paragraphs later, the court repeated the same alternate approach. This Court affirmed the District Court

summarily. 400 U.S. 932 (1970). In the litigation now before us the total of the line-haul rate and the separate in-transit charge will in no case exceed what the Commission has heretofore found to be a reasonable charge for the aggregate service.

The maximum permissible rates for grain movements with in-transit inspection privileges were established some years ago, it is true, but they have been subject to repeated examination upon the occasions of general rate increases and, as this litigation itself shows, they are far from dead letters from the standpoint of either the railroads or the Commission. They remain the foundation of the Commission's opinion as to what just and reasonable grain rates are with in-transit privileges furnished by the railroad. I see no reason for now disagreeing with the Commission's judgment that the reasonableness of a line-haul rate lower than the maximum allowable has been sufficiently re-examined to permit imposition of a separate in-transit inspection charge, in itself found reasonable, when it is also determined that the existing line-haul rate and the new inspection charge together total less than the maximum Commission-prescribed rate for the two services combined. Surely this presents an inadequate occasion or context in which to frustrate what the Commission found to be a promising effort to solve a critical problem—the freight car shortage—by seeking to deter a wasteful practice not indispensable or even, in the Commission's view, unusually important to the orderly marketing of grain under modern conditions.

For these reasons, I respectfully dissent.

ORDERS FROM END OF OCTOBER TERMS, 1971 THROUGH JANUARY 15, 1973

July 7, 1972

Miscellaneous Order

No. A—1320. Atchison, Topeka & Santa Fe Railway Co. Et Al. v. Wichita Board of Trade Et al., D.C. Kan.

On consideration of the appellants' application for stay, the appellees' reply to the application, and the affidavits and memoranda filed in support of the application and reply, IT IS ORDERED:

(1) That, subject to the condition set forth in paragraph 2 herein, the judgment of the Unites States District Court for the District of Kansas entered in this matter on June 8, 1972, be and hereby is stayed pending a final determination of the appeal by this Court.

(2) That, as a condition of the foregoing stay, each railroad collecting in-transit grain inspection charges under the challenged tariffs shall immediately take steps, including publication of appropriate provisions in applicable tariffs, to do the following:

(a) keep accurate accounts in detail of all amounts hereafter received during the existence of the stay by reason of in-transit grain inspection charges, specifying by whom and in whose behalf such amounts are paid; and

(b) in the event the order suspending the charges is affirmed by this Court, refund (with interest) of such amounts to persons in whose behalf such amounts were paid, without the necessity for such persons to make applications for refunds. In the event this Court's action should be other than in affirmance of the results reached by the District Court, this Court may make such further order concerning the disposition of the aforesaid amounts as the Court may deem appropriate.

Investigation and Suspension Docket No. 8548

INSPECTION IN TRANSIT, GRAIN AND GRAIN PRODUCTS

Decided April 16, 1971

REPORT AND ORDER

DIVISION 2, COMMISSIONERS WALRATH, JACKSON, AND BREWER

WALRATH, *Commissioner*

Due and timely execution of our functions under section 15(7) of the Interstate Commerce Act imperatively requires the omission of a hearing examiner's report and recommended order. Requested findings not specifically discussed in this report nor reflected in our findings and conclusions have been considered and found not justified.

By schedules filed to become effective March 28, 1970, and later, the Traffic Executive Association of Eastern Railroads, together with other rail publishing agents and individuals rail carriers, proposed to establish new or increased charges for the first in-transit inspection of grain and grain products at points in the United States. Upon the protest of interested shippers and other parties, the proposed schedules were suspended by the Commission, Board of Suspension, to and including October 27, 1970, for reconsideration and vacation of the order of suspension was denied by the Commission, division 2, on May 21, 1970. Respondents have voluntarily postponed the effective date of the schedules to April 24, 1971.

By order dated April 7, 1970, the Commission prescribed special rules of procedure and assigned the proceeding for

hearing before a hearing examiner. Hearings were held July 13 to July 22 and August 13 and 14, 1970. Briefs were filed October 12, 1970.

The Long Island Rail Road Company intervened in support of respondents. Numerous protests were filed against the proposed schedules and many of the protestants are active participants in this proceeding. They include the Secretary of Agriculture of the United States, State Corporation Commission of the State of Kansas, Missouri Department of Agriculture, North Dakota Public Service Commission, the Boards of Trade at Kansas City, Mo., and Chicago, Ill., and grain exchanges at Omaha, Nebr., Minneapolis, Minn., Sioux City, Iowa, St. Louis, Mo., and Fort Worth, Tex. Appearances were also made by the National Grain Trade Council and the National Grain and Feed Dealers Association on behalf of their members and by representatives of a number of individual grain concerns such as the Continental Grain Company and Garvey, Inc. The latter has extensive grain interests in Knasas, Texas, Illinois, and North Dakota.

In-transit inspection has reference to the practice of stopping railroad cars loaded with grain and grain products, including soybeans, and placing them on railroad track facilities for the purpose of permitting inspection of the contents of the car, awaiting disposition orders from shippers after inspection, and the subsequent movement of the railroad car. The indicated inspection is the taking of a representative sample or samples to determine the official grade of the contents of the car for the purpose of establishing value of the commodity at the market. It does not include any inspection on tracks of the shipper at either origin or destination. The charges[1] per car for in-transit inspection, under currently effective tariffs, are as follows:

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[1]Charges stated herein are subject to *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125, and subsequently authorized general increases.

	First stop	Second and subsequent stops
Within eastern territory	$7.42	$13.29
Within Illinois territory	None	14.33
Within southern territory	None	12.51
Within western territory: Border markets along the Mississippi River and northern Illinois.	None	14.33
Within western territory: On and east of the Missouri River markets, also Minneapolis-St. Paul, Duluth-Superior and points east thereof.	None	13.78
Within western territory: West of the Missouri River including southwestern territory, and west of Minneapolis-St. Paul and Duluth-Superior.	None	13.36

The proposed per-car charges for each stop, including the first stop, on the rail carriers' tracks for inspection are (1) within Eastern, Illinois, and Southern Freight Association territories—$14.33; (2) on and east of the Missouri River markets, also Minneapolis-St. Paul, and Duluth-Superior and points east thereof—$13.78; and (3) west of the Missouri River, including southwestern territory, and west of Minneapolis-St. Paul and Duluth-Superior—$13.36. It should be stressed that the in-transit inspection is primarily an operation in the West. Respondents' studies indicate that there were 464,000 inspections on 16 western railroads in 1968 and 488,000 on 15 western railroads in 1969. There was a much smaller number of inspections in the East and the South. In the South, inspection on carriers' tracks is regularly performed at only four locations, all of which are export ports.

Background.—A brief description of production and marketing of the considered commodities, their importance to the Nation's economy and to the railroads, and the significance of the transportation charges is helpful to an understanding of the issues presented in the instant

proceeding.[2]

For the most part, the various grains[3] are grown in the farming or agricultural States that form a rough crescent from Ohio in the east through to Montana, Idaho, Oregon, and Washington, in the west and around to Oklahoma and Texas in the Southwest. The greatest production of wheat is found in Colorado. Kansas, Nebraska North Dakota, Montana, Oklahoma, Oregon, and Washington. Corn and oats are produced in large quantities in Iowa, Nebraska, Minnesota, Missouri, Illinois, Indiana, and Ohio. The sorghum production is heaviest in Texas, Knasas, and Oklahoma, and soybeans are grown principally in Illinois, Indiana, Ohio, and Arkansas.

The total amount of grain grown in these States is substantial. The 1969 estimates show that total grain production in Iowa is in excess of 1.2 billion bushels and Kansas and Nebraska are each shown to have produced more than 600 million bushels. Some 300 million bushels were produced in Missouri and the yield of both Montana and Washington during the same year was in excess of 100 million bushels. Oklahoma and Texas are also producers of large quantities of grain. The former's wheat production in 1969 exceeded 100 million bushels and Texas produced nearly 70 million bushels of wheat and more than 300

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[2]A more detailed description is available in two general investigations instituted by the Commission pursuant to a resolution of the Congress. The first was directed to the railroad movement of grain and grain products within the western district and for export and is reported in *Grain and Grain Products*, 205 I.C.C. 301, and 215 I.C.C. 83. This proceeding is sometimes referred to in this report as docket No. 17000, Part 7. The second concerned the movement of the same commodities in the South and is set forth in *Grain To, From, and Within Southern Territory*, in 259 I.C.C. 629. There is also a more recent summary in *Grain and Grain Products* (Rate Structure Investigation, Part 7), 329 I.C.C. 824 (1967).

[3]Grain, unless otherwise indicated, includes corn, wheat, oats, barley, rye, sorghums, and soybeans.

million bushels of sorghum grains. There is also a substantial production of grain, particularly corn and soybeans, in Illinois and Indiana. The Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee) transported more than 3,700 carloads of Illinois corn and nearly 700 carloads of Illinois soybeans in 1969. The Chicago and North Western Railway Company (C&NW) originated approximately 5,000 carloads of corn and 1,000 carloads of soybeans in Illinois during the same year.

Enormous quantities of grain move from the country origin points to the nearest price-fixing or first markets. The Missouri River markets of Sioux City, Omaha, Atchison and Leavenworth, Kans., and St. Joseph and Kansas City, Mo., serve the producing areas west thereof, and, with the gulf ports, grain from the southwestern States. Duluth, St. Paul, and Minneapolis, Minn., and Superior, Wis., act in the same capacity on the easterly flow of grain grown in the producing areas east of the Missouri River.

Receipts at Chicago are indicative of the importance of the grain markets. In 1969, slightly more than 194 million bushels of grain were received there, of which approximately 98 million were delivered by railroad. Some 81 million bushels were delivered by truck and about 15 million bushels were delivered via water carriers. The grain receipts and the other markets are also substantial.

The grain traffic is extremely significant tonnage for the railroads, particularly those in the West. In 1969, the Chicago and North Western Railway originated 118,348 carloads of grain. This reflected 8.6 percent of their carload traffic and 11.83 percent of total carload gross freight revenues. The railroads that merged to form the Burlington Northern (BN) carried some 20.5 million tons of grain in the same year, which represented 13.2 percent of the gross tons of all their carload freight traffic. The revenue earned for handling this tonnage was $117.7 million and constituted 14.9 percent of gross revenues. The Atchison, Topeka and

Santa Fe Railway Company (Santa Fe) for 1968 showed that the movement of wheat and sorghum grains accounted for 6.63 percent of its total revenue and 12.1 percent of total tonnage carried. Similar figures are submitted by the other western railroad respondents and, while tonnages and revenues varied, grain traffic is shown to be particularly significant in every instance.

The rate structure applicable to the railroad movement of grain and grain products from the West to the East and Southeast differs from the applied in connection with other commodities. For the purpose of this report, it is sufficient to state that the freight charges are generally determined from the application of combination rates composed of gathering rates to the price-fixing or first markets and proportional rates beyond. This rate structure is described in the Commission proceedings[4] mentioned earlier. Under the structure, certain services are historically provided by the railroads. One such service is transit, which is the privilege of stopping a grain shipment prior to final destination for storage or processing with later reshipment to destination at freight charges for the entire movement no higher than the charges assessed for uninterrupted movement from origin to destination. Another such service is inspection and sampling. Until recently, official inspection was required by Federal statute. Both transit and inspection were authorized originally without any additional charge. Separate or additional charges for transit and inspection services, however, have been assessed in recent years in connection with particular movements of grain and grain products under specific rates, and, in the East, a separate charge for the first inspection of a carload of grain was established in 1963. However, the practice in the western district has been to permit the first inspection without any charge. The proposed schedules, if they become effective, will change this practice.

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[4] *Grain and Grain Products*, 205 I.C.C. 301, 215 I.C.C. 83, and Rate Structure Investigation, Part 7, *supra*.

For many years, the railroads that originated substantial quantities of grain have made provision for sampling and inspection while the loaded cars were in transit. The provisions of the Federal statute requiring an inspection to establish the official grade could have been satisfied by inspection at point of origin prior to loading of the railroad cars or at point of destination after the cars had been unloaded. However, as a practical matter, it was easier for the grain trade if the samples on which inspection is made were drawn from the loaded railroad car and the inspection completed before the grain was unloaded. This was established as the practice and the Commission approved and provided for the continuance of the in-transit inspection at the line-haul rates in *Grain and Grain Products, supra.* There has been some erosion of the rail carrier practice of providing for the inspection in transit. This has been true where the railroads have established special reduced rates for particular movements of grain. However, the Docket No. 17000, Part 7, maximum rates which have limited application in the West, and the currently effective rates for general application which are on a lower level than the prescribed basis, continue to authorize the transit and inspection services that have long been available to the grain shippers. Where Docket No. 1700, Part 7, maximum rates are applicable, the charges proposed here do not apply. Nor will the charges apply where the line-haul rates plus the inspection charge equals or exceeds the maximum prescribed level. Thus the prescribed level will not be exceeded under this proposal.

The issue before the Commission in this proceeding is whether or not the proposed departure from the established practice of providing the inspection service is just and reasonable. The grain shippers continue to make extensive use of the prevailing in-transit inspection service, and if the proposed charges become effective it will result in either increased cost to the shippers or in modification of current practices.

Prior to 1967, the United States Grain Standards Act provided that all interstate movements of whole grains, sold by grade and shipped to or from designated markets, be inspected for the purpose of determining their official grade. This provision was originally designed to protect the purchasers of grain. However, beginning sometime in the early 1960's it became apparent that the requirement of mandatory inspection of interstate grain movements had ceased to serve its original purpose. The increasing diversion of bulk grain movements from railroad to other transportation modes, particularly to motor trucks, rendered uniform enforcement of the mandatory inspection requirement difficult. In-transit services are not available by other modes of transportation. In addition, a part of the grain trade found it expedient to market grain without benefit of official grade determination by the U.S. Department of Agriculture. For these reasons the U.S. Secretary of Agriculture proposed the 1968 revision of the Grain Standards Act which eliminated the mandatory inspection. The primary objective of the revision was to expedite and simplify the movement of whole grains. The railroad industry supported the elimination of the inspection requirement because they believe such action would improve car utilization. They were supported in this position by some Federal and State agencies.

Several of the protestants objected to the receipt of evidence submitted by the respondent railroads purporting to show that improve car utilization was a major objective of the 1968 revision. They have renewed their objection in briefs contending that the hearing examiner improperly received evidence of the legislative history of the revised act including testimony of witnesses before congressional committees. The evidence was properly received by the examiner and his ruling is affirmed. Neither the provisions of the revised Grain Standards Act nor the legislative history indicates that improved car utilization was the primary factor in the enactment of the 1968 statute.

However, it is equally clear that improved car utilization in the movement of whole grain by railroad was a consideration in the revision.

Need for in-transit inspection.—Before lookin to the level of the proposed charges in relation to the services performed in connection therewith, and the corollary question directed to the inclusion of the cost for such services in the line-haul rates, it is helpful to examine into the present need for in-transit inspection. An important segment of the opposition is based on the proposition that such inspection is essential to the orderly marketing of whole grains and that the substitute or alternative inspections at origin or destination, advocated by the respondents, is unacceptable to the grain trade for a number of reasons. The respondent carriers, while urging that the overriding justification for the proposed schedules is the critical need for improvement of car utilization, submit that there is no longer any real necessity for the in-transit inspection service.

We have noted that there is a substantial use of the considered inspection service, especially in the West. Some grain shipments even received two in-transit inspections without the imposition of any additional charge. Generally, the tariffs applicable to the movement of grain in the West provide for only one inspection without charge and there is a published charge for the second and subsequent inspections. However, in addition to the one free inspection allowed under the currently effective tariffs, an additional free inspection is permitted at destination where the car is unloaded in lieu of reconsignment.[5] Under the suspended tariffs, a charge would be made in the West for both an intermediate inspection and a destination inspection while on the carriers' tracks. Both inspections are in transit since

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[5]A study by the western railroad respondents in 1967 established that there was an average of 1.6 inspections per shipment. Consequently, a large number of inspections for 1968 and 1969 are duplications or repeat inspections.

the car is stopped and held out of its other wise normal course of movement.

There is a need for a sampling and inspection of the grain at some time during the marketing process. The grade of the particular shipment must be determined before the majority of sales can be consummated. For a number of reasons it has been convenient for grain shippers and receivers to have the grain inspected while in transit. If a variance of the grade from what was offered is shown by the inspection, the shipment can be reconsigned to more appropriate markets. Also, there is less chance of deterioration of the grain following the in-transit inspection than is the case if the inspection is made earlier at the point of origin. Finally, the possibility of bias is lessened if the inspection occurs after the shipment leaves the origin elevator. These factors, along with the madatory requirement for inspection, were the basis for providing the in-transit inspection originally, and for the Commission's approval of the practice in its reports in the Docket No. 17000, Part 7, proceedings. These are also the factors stressed by protestants in urging that origin and destination inspections are not acceptable to the grain trade. However, it is not essential that the grade of the grain be determined while the particular shipment is in transit on the railroad. As noted, the inspection is now permissive and it can take place elsewhere. The record in this proceeding shows that there is a substantial growth in the use of origin mechanical sampling for inspection. These relatively low-cost samplers[6] are installed in the existing elevator grain spout and are electronically timed and operated. A representative sample of the grain being loaded in the rail car is obtained and taken to an inspection laboratory for analysis and grading. The origin sampling devices are approved under existing regulations of the U.S. Department of Agriculture.

The authorized samplers in Iowa increased from 33 to 75

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[6]The record shows installation cost to range from $1,000 to $2,000.

between August of 1969 and the same month in 1970. During the same period, in Illinois, the number increased from 7 to 15; in Nebraska from 27 to 53; and in Kansas from 11 to 25. This growth is not sufficient as yet to result in a decline in the number of in-transit inspections on the railroads, but the increase in the number of automatic samplers at the origin elevators does show that this method of inspection does not adversely affect the grain marketing process.

The basic responsibility of the railroads does not require them to provide the service for in-transit inspection. The fact that the carriers have provided such service, and have included the cost thereof in their line-haul rates, does not preclude a change or modification of the practice if circumstances justify some revision. Therefore, we conclude that the service made available by the railroads in connection with in-transit inspection is not shown on this record to be essential to the grain marketing process. The in-transit inspection is now permissive under the Federal statutes and can be either omitted entirely or made through samples taken prior to tender at origin or subsequent to delivery at destination. There are numerous shipments of the grain where in-transit inspections are not performed. Grain inspection is an accessorial service for which a charge separate from the line-haul charges may properly be assessed. See *Grand Forks Chamber of Com. v. Great Northern Ry. Co.*, 321 I.C.C. 356. Whether the separate charges proposed herein are just and reasonable requires a more extended review of the evidence submitted.

Respondents.—The railroads offer a two-pronged justification for the proposed charges. The asserted primary objective to be attained under the proposed charges is a substantial increase in car utilization through elimination of the delay time required for inspection with a resultant improvement in the critical car shortage. In fact, in brief, the respondents state that "the railroads do not want to

collect one penny of the charges proposed." The considered charge is proposed as an incentive to shippers to forego in-transit inspections. Secondly, the respondents, having in mind the burdens that must be met in a proceeding directed to increased charges, attempt also to show that the cost directly related to the performance of the inspection exceeds the charges proposed to be assessed for such service.

Respondent carriers submitted evidence of the decrease in the ratio of revenues to out-of-pocket costs for the movement of whole grains from 218 percent in 1950 to 149 percent in 1966. This data compiled from waybill statistics cost scales, and related publications of the Commission's Bureau of Economics and Bureau of Accounts, are reflected in the following table:

Year (1)	Revenues (2)	Out-of-pocket cost (3)	Ratio of revenue to out-of-pocket cost (4)
			Percent
1950	$3,566,568	$1,637,840	218
1955	4,119,817	2,039,467	202
1960	4,946,158	2,877,519	172
1966	5,205,729	3,490,094	149

The figures in the table represent a 1-percent sample of rail terminations on all grain traffic.[7] Figures later than 1966 are not available. The purpose of the table is to illustrate that during the last 20 years the rates on grain moving by railroad have been reduced and, consequently, the contribution of this traffic to the overhead burden has been lessened due to the reduced rates and increasing cost of operations. Most of the reductions were made by the railroads to meet the increased competition of the motor trucks and barges. The respondents followed procedures

[7] The figures shown in the table should be multiplied by 100 to obtain total figures.

used by the Commission's cost finding section to determine the out-of-pocket costs for 1966. Those for the prior years were taken from so-called contribution studies of the same section.[8]

A number of studies were presented by the respondents which purport to show their costs for performing the in-transit inspection. The following cost items are listed by respondents as those created and possibly avoidable by the elimination of grain inspection at in-transit stops on the railroads: (1) car detention and associated car costs, (2) cost of switching the cars to inspection tracks on the railroads, (3) clerical costs associated with inspection, (4) loss and damage costs, (5) excess per diem costs, (6) costs that result from delays in handling other traffic because of cars held for inspection, and (7) costs associated with backhaul movements to provide for inspection.

The firststep was to determine the amount of car detention that resulted from stopping the grain cars for inspection. Five studies were made and they are summarized in the following table:

Summary of all car detention studies

				Weight-of-the-evidence considerations	
Line (1)	Study carriers (2)	Average delay due to grain inspection (3)	Method of selecting study stations (4)	Time period of the study (5)	Annual inspection volume (number of inspections) (6)
		Hours			
1	Western	78.01	Random	1 year	476,000
2	Eastern	44.91	Judgment	3 to 8 months	24,500 (Penn Central only)
3	Northern Pacific	68.00	judment (nearly a census)	10 months	8,035 (10 months only)
4	Great Northern – Great Falls	92.30	Judgment	1 week	Unknown
5	Great Northern – Spokane-Hill yard	92.90	Judgment	1 week	Unknown

[8]Distribution of Rail Revenue Contribution by Commodity Groups.

Because the Western study was based on a random sample, covered the period of 1 full year (1968), and had application to the greatest number of inspections, the respondents contend that it should be accorded the greatest weight. In the Western study, 18 study stations[9] were selected at random from the complete list of 217 stations where grain inspection occurred in 1968 on the 16 western railroads[10] that participated in the study. At each of the 18 study stations, a simple random sample of inspected cars and a simple random sample of uninspected cars was chosen.[11] The difference in average handling times between inspected cars and uninspected cars at each station is the delay time due to grain inspection at that station. Eighteen delay times were obtained for grain inspection, one delay time for each study station. These 18 delay times were then combined using a weighted average formula to obtain the result shown in the table.

From the beginning the two groups of cars at each station were made comparable in four respects: year, commodity, station, and method of arrival. A group of inspected cars was compared with a group of uninspected cars that moved

[9]They are listed in appendix B.

[10]Atchison, Topeka and Santa Fe Railway Company (Santa Fe); Chicago, Burlington & Quincy Railroad Company, The Colorado and Southern Railway Company, Fort Worth and Denver Railway Company (these three are now a part of Burlington Northern); Chicago and North Western Railway Company (C&NW); Chicago Rock Island and Pacific Railroad Company (Rock Island); The Denver and Rio Grande Western Railroad Company (Rio Grande); Illinois Central Roadroad Company; Kansas City Southern Railway Company; Louisiana & Arkansas Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railraod Company (Milwaukee); Missouri Pacific Railroad Company); Texas and Pacific Railway Company; St. Louis-San Francisco Railway Company; Southern Pacific Company, and Union Pacific Railroad Company.

[11]In two cases (inspected cars at Belmond and Stockton); there were less than 100 cars and for these, every car was studied. In the other 34 cases, samples of approximately 100 cars were used.

in the same year, carried a grain subject to the proposed charge, were handled at the same station, and arrived on a road train of the reporting carrier. Subsequent to the start of the study, an adjustment was made based on segregating all study cars into one of three movement types — delivered at the study station, moving through the study station but taking an intertrain switch to do so, and moving through the study station on the same train. Respondents assert that the figure of 78.01 hours is based on groups that are comparable in five respects: year, commodity, station, method of arrival, and type of movement. The results are shown in appendix B.

Respondents used this adjusted delay time (78.01 hours) to determine the cost of the delay for an inspection of a grain car in the western district. This cost was computed on several bases as outlined in the following table:

Using adjusted delay time of 78.01 hours or 3.25 days

Cost groupings[1] (1)	Days detention (2)	Cost per day (3)	Total cost per inspection (4)
I	3.25	$3.12	$10.14
II	3.25	2.56	8.32
III	3.23	2.79	9.07
IV	3.25	2.24	7.28
at 1. *Standard error*			
I high	3.59	3.12	11.20
low	2.91	3.12	9.08
II high	3.59	2.56	9.19
low	2.91	2.56	7.45
III high	3.59	2.79	10.02
low	2.91	2.79	8.12
IV high	3.59	2.24	8.04
low	2.91	2.24	6.52

[1]Explanation:

I. Car costs based on per diem procedure including 6-percent return on freight train cars.

II. Car costs based on per diem procedure including a 4-percent return on freight train cars.

III. Car costs were determined by the application of Rail Form A including a 6-percent return on freight train cars.

IV. Car costs were determined by the application of Rail Form A including a 4-percent return on freight train cars.

As indicated earlier, there were other studies of the detention time for the in-transit inspections which the respondents urge corroborate the costs shown in the above table. The results of such studies are shown below:

Study carriers (1)	Days detention (2)	Cost per day (3)	Total cost per inspection (4)
1. Eastern carriers	1.87	$2.76	$5.16
2. Northern Pacific	2.833	2.63	7.45
3. Great Northern – Great Falls	3.84	3.52	13.52
4. Great Northern – Spokane-Hill yard	3.87	3.52	13.62

The other item of cost determined by the respondents was switching. Respondents determined that the inspected grain cars require on the average an additional 8.39 minutes of switching. This covers removal of the car from the inbound train to the inspection hold tracks, any additional switching on the hold tracks and finally the removal of the car to either the outbound train or to an industry switch. This study embraced 11 stations in the western district and is reflected in the following table:

Final results of the western carriers' switching studies

Railroad (1)	Station		Switch engine minutes per carload (4)
	City (2)	State (3)	
MILW	Aberdeen	S. Dak	3.52
ATSF	Atchison	Kans	4.20
CRIP	Belmond	Iowa	9.89
SP	Colton	Calif	23.17
CNW	Huron	S. Dak	3.29
IC	Iowa Falls	Iowa	6.28
BN	Lincoln	Nebr	2.04
UP	Omaha-Council Bluffs	Nebr-Iowa	5.50
MP	St. Joseph	Mo	3.20
UP	Spokane	Wash	14.99
BN	Superior	Nebr	11.67
	Weighted average		8.39

The stations in the table were considered to be representative with respect to, (a) the number of railroads considered, (b) geographic dispersion, (c) dispersion among statistical strata, and (d) range in volume of traffic. The period of study was 7 consecutive days at each of the 11 stations. The engine minutes produced by the study for the actual movement of the inspected cars were increased to include nonproductive time charged to switching operations. The out-of-pocket costs per engine minute were developed for all of the 16 western railroad respondents combined through the application of a Rail Form A for the year 1969. The results are shown in the following table which also includes computations presented by the eastern railroads respondents and those made by studies submitted on behalf of individual respondents.

Cost of additional switching required for grain inspection

Carriers (1)	Added switch engine minutes (2)	Cost per engine minutes (3)	Total cost of switching (4)
1. Western railroads	8.39	$0.76070	$6.38
2. Eastern railroads	10.30	0.76206	7.85
3. Northern Pacific	4.906	0.803	3.94
4. Great Northern – Great Falls	12.65	0.6559	8.30
5. Great Northern – Spokane-Hill yard	9.60	0.6683	6.42

No attempt was made to determine the remaining items of cost associated with in-transit inspection on behalf of the western railroads as a group.[12]

Essentially, the respondents rely on their general study embracing the 16 western railroads and on the two cost items only-car delay and added switching. They do contend that the other costs are sustained and, to that extent, the costs shown are understated.

The primary figure relied upon by the respondents to show the cost of providing in-transit inspection is $16.52 and this figure is based, as stated, only on the expense categories of car detention and switching for the western railroads. This is composed of $10.14 as cost of car detention and $6.38 for cost of switching. The proposed charges range from $13.36 to $14.33. None of the respondents' showing as to detention time, switching minutes, or other costs makes reference to in-transit inspections in southern territory. The number of inspections in that territory are small and it

[12]One of the respondents (Union Pacific Railroad)after an analysis of 956 inspected grain cars at three of its stations, Denver, Colo., Omaha and Lincoln, Nebr. concluded that its clerical costs amounted to 84 per car and that there were additional costs of 18.4 cents per car-mile for the backhaul required to move some cars to the inspection point. The total cost per car including a cost of $3.51 per day for each day the car was detained and $8.58 per switch ranged from $34.36 to $75.89. The study was based on data accummulated in 1968. One of the eastern railroad respondents also submitted a study which showed added clerical costs of

is respondents' position that where they occur the same elements of car delay, car expense, and switching expense are involved.

The eastern railroad respondents have a currently effective charge for in-transit inspection of grain. It will be increased under the proposed schedules. These respondents undertook to develop the minimum costs incurred for holding cars for inspection, and their studies are discussed later in detail. Essentially, these costs include detention of cars, additional switching, and clerical expenses. The detention study in the East was confined to the three railroads on which the great majority of grain inspections are performed, Penn Central, C&O-B&O, and Norfolk and Western. The results indicate that the weighted average delay time due to grain inspection amounted to 44.91 hours per inspected car, which produces per car expense of $5.16. The switching studies encompassed 141 cars with an average switching time for inspection of 10.3 minutes per car more than is required on noninspected cars. At a unit-cost of $0.76206 per switch engine minute, this produced a cost of $7.85 per car. The clerical cost based on test observations at three inspection points (East St. Louis, Ill., Indianapolis, Ind., and Toledo, Ohio) show a cost of $0.92 per bill. The total of the three elements of expense amounts to $13.93 per car on the basis of a 4-percent return on investment after Federal income taxes. On the basis of a 6-percent return on car value, the total expense is shown to be $15.96 per car. The proposed charge is $14.33.

Other studies were made by individual respondents in connection with the car detention and additional switching and these differ from those shown in the study for the 16 western railroads. Respondents submit the individual studies for corroboration of their primary study. The results of such studies are shown in

the tables set forth earlier, and the studies are described later in this report.

The respondents urge that the proposed charges, if they become effective, will not contravene the Commission's orders in the Docket No. 17000, Part 7, proceedings. The latter proceeding fixed the maximum rates for the movement of grain and grain products to, from, and within the West and there has been no vacation of that aspect of our outstanding orders.

Respondents direct attention to the fact that the proposed charges will not apply to in-transit inspections where the underlying line-haul rates are at the Docket No. 17000, Part 7, level as increased by subsequently authorized general increases. It is their view that the currently effective rates on the vast majority of grain movements even when combined with the inspection charge proposed in the suspended tariffs do not exceed the Docket No. 17000, Part 7, level. Where they do, the proposed charge will not apply. Consequently, they submit that no violation of the outstanding orders can occur.

Anticipating that the protestants will make reference to a recent decision of the Commission, division 2, wherein proposed new transit charges (no separate charges were in effect for transit service), were found not shown to be just and reasonable, *Transit Charges, Southern Territory*, 332 I.C.C. 664 (1968), the respondents urge that that decision is not applicable to the facts herein. There it was concluded, *inter alia*, that the railroads failed to show that their existing line-haul rates were not already sufficient to cover the service. Respondents urge that here they have demonstrated that the proposed charges are just and reasonable compared to the cost of providing the inspection service, and that in the western district, the proposed charges, when combined with the existing line-haul

rates, are less than the maximum prescribed rates on the same commodity. In the cited proceeding, it was also concluded that the proposed transit charges would likely divert traffic away from the railroads and thereby impair the railroads' net revenues. Such a determination is not possible on the evidence here, according to respondents. It is their view that competition with other modes for grain traffic will not be affected by the proposed charges.

Finally, the railroads refer to two issues raised during the hearing. The first is directed to a showing by the protestants that the proposed charges will result in violations of section 4 of the act. The respondents submit that any such violations are unintentional and will be corrected by appropriate tariff amendments when they become known. The second also relates to allegedly inadvertent changes in rates which one protestant submits results in unlawful preference. Respondents urge that there is no showing of any undue preference or prejudice of any location or shipper as to any traffic.

The supporting intervener, The Long Island Rail Road Company, advocates the same propositions advanced by the respondents. This party is particularly concerned with the practice of in-transit inspection in its relation to freight car supply. It suggests that the elimination of the car days for this inspection service would contribute more to the alleviation of the freight car shortage than the imposition of higher *per diem* charges on the terminating carrier. The intervener urges that the proposed charges are justified principally because of the benefits that will result in freight car supply and utilization.

Protestants.—Some 15 separate briefs were submitted by the protestants. Each of these parties request that the considered charges for in-transit

inspection be found not shown to be just and reasonable. Their arguments and evidence in support, is grouped into the following categories: (1) grain must be inspected and the only practical way for it to take place is while the shipment is in transit on the railroad, (2) the cost of the considered service is included in the line-haul rates and the proposed charge represents a surcharge not shown to be reasonable or justified, (3) car detention on grain inspected cars, where it occurs, is due to inefficient operating practices of railroads, (4) elimination of the in-transit inspection will not materially contribute to car supply, (5) the detention and car studies offered by respondents are basically deficient, and (6) the proposed charges, if they become effective, will result in violations of section 4 of the act.

Extensive evidence is presented by the protestants, particularly from the grain exchanges and the boards of trade, purporting to show that despite the change in the Federal statute an official inspection is required for the orderly marketing of grain. They also presented evidence showing the substantial movement of the grain loaded cars to inspection points for sampling and grading before the grain can be placed in trade channels for sale and distribution. The purpose of such evidence is to show that there is no other way for the preponderance of country grain elevators to secure official grades on the grain since they do not have automatic grain samplers. The grain market representatives also stress the necessity for an official inspection while the grain is still on the lines of the railroad in order to permit reconsignment of the shipments. Destination and origin sampling and inspection are impractical, according to the protestants. The former because the consignee would have difficulty in disposing of a shipment that failed to meet the grain required by his needs, and the latter because the cost of an original sampler precludes its

installation at the majority of the country elevators.

The Secretary of Agriculture and most of the other protestants argue that the respondents have failed to sustain their burden of establishing that the proposed "additional charge" they seek to impose is reasonable and lawful in relation to the cost of performing the through service. Since the railroads, particularly those in the West and South, are presently not assessing a charge in their line-haul rates for the first stop for inspection, the protestants allege that the carriers may not now segregate the inspection service and assign to it a separate charge without first considering the entire through service of which the inspection is part and the compensation now being received for such service. The Secretary indicates on brief that he does not oppose the concept of a separately states charge for the first stop for inspection but insists that the Commission must consider the revenue derived from the line-haul rates before it can determine the level of such a separate charge. A similar position is advocated by protestant National Grain and Feed Association. The latter submits that respondents have not sustained their burden of showing that proposed charges, applied in conjunction with the line-haul rates that permit the inspection, are just and reasonable. In support thereof, reliance is placed on *Transit Charges, Southern Territory supra*, hereinafter more particularly considered.

There is also considerable evidence by protestants directed to the proposition that the car detention resulting from the in-transit inspection is due to respondents' inefficient operations. The presentation of the Fort Worth Grain Exchange, Fort Worth, Tex., and Far-Mar-Co., Inc., a company engaged in the handling, storage, and merchandising of grain with facilities in Colorado, Kansas, Nebraska, and Missouri, is representative of the showing in this area. The Fort Worth Exchange maintains that the Fort

Worth yard of the Rock Island, one of the railroad yards in respondents' study, has antiquated facilities and an analysis of the service rendered shows that too many cars designated for inspection are held in this yard. The delays for inspection are allegedly attributable to the inability of this respondent to perform the service. Similarly, Far-Mar-Co., Inc., contends that one of the respondents serving the inspection point of Hutchison, Kans., regularly delays the movement of its cars following inspection until the second day after receipt of billing instructions. Almost without exception, the protestants urge that since the grain trade will continue to require the in-transit inspection there is little hope for enlarging the car supply under the proposed charges. If these charges become effective, the result will be an increase in respondents' revenue and the inspection delays that hinder a more efficient use of railroad cars will continue according to the protestants.

These parties also assail the various studies submitted by the railroads. Led by the Board of Trade of the city of Chicago and beginning with the profitability analyses, they uniformly challenge the reliability of all the studies presented. The use of the waybill statistics to measure the decrease in profitability for the grain movement is attacked because of the changes in the transportation of grain by railroad since 1966. The increased use of the heavier loading covered hopper cars, multiple-car movements, and unit trains in the past 4 years assertedly makes respondents' comparisons invalid. However, the principal opposition is directed to the car detention and switching studies.

Protestants contend that the basic premise of the detention study, namely, that any significant differences between the detention time for inspected cars and the control group of uninspected cars at any given station could be properly attributed to the service of inspection, in not established. Initially, as indicted, the respondents treated the inspection group of cars and the control group as if they

were directly comparable and equal in all respects except for differences that may be attributable to inspection. There was criticism during the hearing by protestants as to whether the inspected cars and uninspected cars differ importantly in the proportions in which they fall into different types of movement such as terminating, through, and transfer cars. Any differences could seriously bias the study. As indicated earlier, an adjustment was made to take care of this problem (the so-called like-vs.-like correction). Protestants do not accept the adjustment. They urge that for each of the 18 study stations there are five types of movements where inspected and uninspected cars would potentially be compared on a like-with-like basis or a total of 90 potential comparisons. Appendix B to the report shows protestants' computation of numbers of cars, inspected and uninspected, in the five types of movement for the 18 study stations. Of these 90 situations in which comparison could be made, there are assertedly only 27 instances in which both inspected and uninspected cars occur and, even there, protestants submit that there are numerous instances where the number of inspected or uninspected cars is so small that no meaningful conclusion could be drawn from the happenstance of the detention time on such a small number of cars. On a total of 3,387 cars in the study, protestants contend that only 1,000 have a like-with-like comparison.

The second asserted basic error in the carriers' detention study to which protestants refer is that is was designed to include a large portion of time which they submit is not attributable to in-transit inspection. It is their view that the preponderance of the inspected cars in the study were at the particular study stations because they were to be delivered to industries at that point. The study, by definition, include the time the car spent at the study stations until it departed in a switch run to the industry which included all the time the cars spent on constructive placement because the industries were unable to receive additional cars. Protestants submit

that the constructive placement time should not be included in the time charged to inspection since the industry could not receive the cars regardless of whether they have been inspected or not.

Other deficiencies in the detention study are charged by protestant. These include the use of estimates at certain of the stations for delivery of uninspected cars; the elimination from the study of certain uninspected cars which were not representative and produced unduly long detention times; the failure to offset the detention time with the time the car would be held for sampling at origin; and the method of expanding the sample after the data was developed. Protestants did not attempt to restate the results because it is there view that the described defects cannot be cured by a restatement and they ask us to conclude that the extensive study has failed to produce a reliable and accurate estimate of the detention time.

Much criticism is also offered of the switching study submitted by the 16 western railroad respondents. There are allegedly three principal deficiencies in the 11-station study which make it unacceptable: (1) the 1-week period used is not a representative period, (2) the study assigned switching time to gain cars for inspection that should not be attributed to such cars, and (3) the assignment of too much nonproduction time to the inspected cars. Here, as in the detention study, protestants assert that the switching data submitted was so basically deficient it was impossible to make corrective adjustments and restate the switching costs. The other studies offered by the individual western railroads and by the eastern railroads were considered similarly deficient by protestants.

Finally, protestants argue that the assessment of the proposed charges will result in violations of the act. Primarily, reliance is placed on violations with respect to the provisions of section 4 but there are also allegations that the additional charges, if they become effective, will produce

unlawful preference and prejudice. As stated, the respondents do not propose to make the charges applicable where the line-haul rates for the movement of the grain when coupled with the said charges result in transportation charges that exceed the Docket No. 17000, Part 7, maximum rates as increased. This method of publication has resulted in departure from the long-and short-haul provisions of the section. While the respondents have indicated a willingness to correct all the violations brought to their attention, the protestants submit that there are numerous instances of section 4 violations and it is the obligation of the railroads to propose rates and charges which do not result in violations of the act.

Some of the protestants urge that the rate differences resluting from the elimination of the assessment of the charge whre the applicable line-haul rates are at the Docket No. 17000, Part 7, level also cause unlawful preference and prejudice. The Public Service Commission, State of North Dakota, contends that the assessment of the charge for inspection on shipments of grain originating in North Dakota, which was approved in *Grand Forks Cham. of Com.* v. *Great Northern Ry. Co.*, 321 I.C.C. 356, results in undue prejudice to the North Dakota grain shippers and undue preference of other shippers of grain not paying the charge. This party asks the Commission to make the charge uniform throughout the western district. If the proposed charges are found not to be just and reasonable, we are asked to conclude herein that the charges applied in North Dakota are unduly prejudicial.

DISCUSSION AND CONCLUSIONS

This proceeding presents complex factual and legal issues and there is intense controversy. The issue of the lawfulness of any part of the unique pricing system applicable to the railroad movement of grain is always a preplexing task. Here the problem is further complicated by the inclusion of

the equally difficult question relating to the national shortage of railroad freight cars.

It is again emphasized that the major impact of the proposal under consideration will be on the movement of grain in the western district. Most inspections occur in this territory. There is presently effective a separate charge for this service in the East. A substantial increase in those charges will result, however, if the proposed charges are permitted to become effective. The number of in-transit inspections in the South is limited and take place chiefly at the ports on export grain tonnage. There is little, if any, opposition to establishment of the charges in southern territory. Practically all of the controversy is concerned with establishment of the separate charge for the first inspection of grain within the western district. Except where indicated otherwise, the discussion relates to the proposed charges in connection with the railroad movement of grain in the West.

We consider, initially, the record in relation to the justness and reasonableness of the proposed charges, without regard to the impact of such charges on the availability of railroad freight cars. We have resolved two preliminary questions. First, the orderly marketing of grain under present practices requires that a substantial portion of the commodity moving in commercial channels must be subjected to some form of sampling and inspection to determine grade or quality. Second, it is not essential to the marketing process that this sampling and grading take place while the grain is in transit on the railroad.

While it is conceded by protestants that in-transit inspection is not mandatory, they submit that it is the only logical and practical way for the sampling and grading to take place. Even if we accept that proposition, it does not constitute a sound basis for requiring the railroads to continue making the service available. The in-transit inspection is an accessorial service. There is no mandate either in the act or in the Commission's decisions that

compel the railroads to continue to provide the inspection service without separate charge merely because such a service is a convenience to shippers or, stated otherwise, provides a logical and practical way for buyers and sellers to be assured of the grade or quality of grain in a particular shipment.

The significant aspect is, of course, whether the establishment of an additional charge for a service that has been provided at the line-haul rates is just and reasonable under the circumstances shown on this record. Protestants submit that it is not since respondents have failed to establish that the combination of the line-haul rate and the proposed charge does not exceed a just and reasonable level for the total services provided. Such an omission is assertedly critical in view of our decision in *Transit Charges, Southern Territory, supra.* Particular reference is made to the following excerpt from that decision (332 I.C.C. at 638 and 684):

***The reasonableness of the proposal cannot be properly determined here without reference to, and consideration of, the line-haul rates, the services furnished thereunder, and the cost thereof. Clearly, in the circumstances presented, the proposed charge may not be divorced from the line-haul rate, for both, insofar as transit is concerned, are inextricably interdependent. Cf. *Terminal Charges at Pacific Coast Ports,* 255 I.C.C. 673 (1943); *Unloading Lumber at New York Harbor,* 256 I.C.C. 463 (1943); and see *Secretary of Agriculture v. United States,* 347 U.S. 645, 652 (1954). While it would seem preferable to have the various elements entering into, and constituting, the whole analyzed, if indeed they could be separated, the entire transportation service rendered, including transit, must be examined in relation to the total rates and charges assessed. Respondents have not endeavored to base their action here on any facts bearing upon the revenue-cost relationship of the complete operation. Nor have they indicated the effect

of the proposal either overall or with respect to the movement of the specific commodities involved.

The instant proceeding is distinguishable from the cited proceeding in two important respects. As indicated, approximately 480,000 in-transit inspections took place in 1969 at various points throughout the western district. The line-haul rates applicable on the grain to, from, and through those inspection points number in the thousands and, because of the complexities of the grain rate structure, vary to a large degree. A requirement that the reasonableness of the proposed charges cannot be determined without "reference to the line-haul rates, the services furnished thereunder, and the cost thereof," effectively precludes respondents from ever establishing a separate charge for the accessorial first stop for inspection regardless of the need for such a charge. This inability was not present in the cited proceeding and even there, on appeal, the District Court of the United States, for the Southern District of Ohio, western division, *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. United States*, 224 F. Supp. 563 (decided April 12, 1970), while sustaining the Commission on other grounds, indicated that the burden of proof required of the respondent railroads was erroneous.

However, there is a more significant distinguishing feature that persuades us that the prior decision is not controlling here. That difference is that the line-haul rate applicable to any movement of grain within the West when coupled with the proposed charge is less than the maximum reasonable level determined by this Commission. In no instance will the combined rate and charge exceed the maximum level prescribed in *Grain and Grain Products, supra*. Nor are we influenced to reach a contrary conclusion by protestants reference to the fact that the rate level was fixed more than 30 years ago and conditions and circumstances relating to the railroad transportation of grain have changed in the interim. There is possibly no

segment of this country's railroad freight rate structure that has been reviewed more frequently than the one that has application to the movement of grain and grain products. In *Grain and Grain Products*, 298 I.C.C. 261 (1956), the Commission, while vacating prior orders in Docket No. 17000, Part 7, relating to the rates and charges on coarse grains, specifically left standing the requirement for the establishment and maintenance of the maximum reasonable rates. In a report decided in 1964, in *Southeastern Assn. of R. & Util. Commrs. v. A., T. & S. F. Ry.*, 321 I.C.C. 519, the Commission relied on the rate factors applicable to the movement of grain within the West in concluding that the rates and method of making rates on grain from, to, and within the South were not shown to be unjust, unreasonable, or otherwise unlawful. In *Grain and Grain Products* (Rate Structure Investigation, Part 7), 329 I.C.C. 824 (1967), the rate structure was again reviewed by the Commission. Furthermore, in practically every general freight rate increase proposal made by the railroads in the past 10 years particular attention has been given to the level of the grain rates and, in several instances, the increases in rates on grain and grain products were less than those authorized for the movement of other commodities. The Docket No. 17000, Part 7, prescribed rates, as increased through the subsequently authorized general increases, are a currently effective maximum rate level for the movement of these commodities.

One of the grounds relied upon by the division in *Transit Charges, Southern Territory, supra*, was that the proposed increase in charges might well result in substantial diversion of the considered traffic with a diminution, rather than an increase, in revenues. Similar conclusions are not warranted here. Comparative costs to the shipper of the movement of grain by railroad versus the movement by truck or barge is essential before a decision can be reached on diversion, and there is no showing here which relates the cost of truck or

barge transportation to the cost of rail transportation with the inspection charge added. Grain will continue to be moved by railroad even if it becomes necessary to pay the proposed charge because of the advantages, such as transit and reconsignment, that are available.

Even though the combined line-haul rate and proposd charge does not exceed the prescribed maximum level, it is still encumbent on the Commission to determine if the separate charge is reasonable when related to the specific service for which it is to be assessed. As indicated, extensive studies are offered to supprt the claim that it is.

The detention studies.—The key evidence with respect to an ascertainment of the cost factor associated with in-transit inspection and, as later considered, in connection with efficient car utilization, is the analyses of the time required to perform the indicated service. The principal study is the joint one presented by the 16 western railroads. The purpose of this study is to determine how much delay time is caused by the in-transit inspection on the railroad's track. The question can be answered satisfactorily by one of two standard methods; one requires a judgment of the inspected car movements, and the other requires the use of control groups. Both the judgment basis and control group may be used with probability sampling.

To eliminate judgments about detailed traffic elements and because of administrative problems in obtaining the required data, the respondent carriers did not use the judgment basis. They used the control group for measuring the indicated delay. Control groups have been extensively used in medicine, industry and Government to determine cause and effect relationships. The two main requirements for an acceptable study are the use of adequate sampling methods and the use of a control group which adequately reflects likeness for those characteristics which may significantly affect the results.

The probability sample of stations for the 1968 car detention study is adequate for the selection of stations. There were 217 inspection stations in the frame covering the 16 western railroads. These 217 stations were stratified into 9 groupings or strata based upon estimated delay time for each of the 217 stations. A simple random sample of two was drawn from each stratum to yield a total of 18 stations. From each selected station a random sample of approximately 100 cars was selected from each of the two categories of inspected and uninspected cars for the year 1968. A total of 3,387 cars were randomly selected for study from which 12 had no data on handling time. Thus, each of the 217 stations had a known chance of being selected as well as each of the cars at the selected stations. This method of selecting study stations is called "stratified random cluster sampling". There was some shifting of some of the frame stations from the original stratified groupings, but this procedure is acceptable and does not invalidate the study since the random selection was done subsequent to this shifting. The delay times for each of the 18 stations were properly weighted and combined appropriately for the method of sampling used. The estimate for delay time developed from this study was 89 hours.

However, after the criticism by protestants described earlier,as to whether the inspected and uninspected cars differ in the proportions in which they fall into different types of movement, adjustments were made to the data which resulted in a reduction to 73 hours of car delay. Basically the correction or adjustment formula (like versus like) takes care of the protestants' objection. This adjustment to the respondents data is equivalent to the use of the following formula. Under the formula the average delay time for a station equals the sum of the following four items:

FORMULA FOR DEVELOPING AVERAGE DELAY TIME DUE TO IN-TRANSIT GRAIN INSPECTION[13]

Average delay time for a station equals the sum of 1, 2, 3, and 4:

1. Average handling time for inspected cars.

2. Minus (proportion of inspected cars delivered at station) multiplied by (average handling time for uninspected cars delivered at station).

3 Minus the allocated[14] proportion of inspected cars moving on through train) multiplied by (average handling time for uninspected cars moving on through train without set out).

4. Minus (the allocated[15] proportion of inspected cars moving on through train) multiplied by (average handling time for uninspected cars moving on through train with set out).[16]

After the average delay time is computed for each of the 18 stations, they are weighted and combined to obtain average delay time due to inspection.

The purpose of this formula is to obtain comparisons between like movements for inspected and uninspected cars. This is done by the use of control groups obtaining like comparisons between pairs of groups of inspected and

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[13]When cars are referred to this will always mean grain cars. Proportion refers to a percentage or ratio of cars in one category to another category.

[14]This allocation based on the application of the ratio of uninspected cars in through trains without set outs to uninspected cars in all through trains.

[15]This allocation based on the application of the ratio of uninspected cars in through trains with set outs to uninspected cars in all through trains.

[16]Set out refers only to the setting out of a grain car by a train.

uninspected cars, made comparable by type of car, time, station, railroad, and type of movement. The types of movements used are grain cars terminating at the study station, grain cars in through movements but set out at the study station, and cars moving in through train movements without being set out.

To eliminate bias due to differing numbers of inspected and uninspected cars at a study station for each of these three types of movements, and formula does the following. Using only the sample data for the study stations and without use of subjective judgment, it automatically allocates the sample data following these basic precepts:

1. The *inspected* cars, if there were no in-transit grain inspection, would have the same proportions of deliveries and through moves that *inspected* cars now have at the study station.

2. The through cars being *inspected* would move on a through train without set out with as much likelihood as an uninspected car at the study station.

These two precepts or rules appear to be relatively realistic and appropriate for the actual situations at the study stations. Even if they may not conform exactly to the situation at a particular station, it seems reasonable that they should conform on the average to the situations at all the study stations combined.

For example, from the study at Fremont, there are 41 grain cars in a through movement that were set out for grain inspection but there were no like set outs for uninspected grain cars. Also, there were 97 uninspected grain cars that moved through on a fast train without set outs. (It is theoretically impossible for an inspected car to move on fast train without set outs.) Therefore, it is reasonable to expect any uninspected cars in the future to move on a fast train car in a through movement were not inspected at Fremont, it would be short-hauled by passing Fremont to its final

destination. But this additional delay time due to backhauling for in-transit grain inspection is not developed by the formula. (See appendix B.)

Even if the five types of movement, referred to by protestants, were used, the average delay time would not change significantly. This is shown in the table set forth in appendix C. The values shown in column 8 of the table indicate the differences between the respondents' figures for delay time and the delay time for the individual categories. These differences indicate no trend in either direction and show in many cases close agreement. Out of 27 comparisons there are 15 which are within 5 hours differences.

Thus, the respondents' formula appears to be a valid and appropriate basis for determining the delay time.

Protestants claim that constructive placement time should have been excluded from the study both for terminating inspected cars and terminating uninspected cars. To the extent that both groups of cars had equal amounts of constructive place time included in their total handling times, constructive placement time is eliminated from the results. On this record it is not possible to state whether inspected cars have more constructive placement time than the uninspected cars. Knowledge about the constructive placement time would be pertinent, but it is not necessary for the establishment of the validity of the car detention study. Five of the study stations (Clinton, Fremont, Lewiston, Little Rock, and Superior) had zero number of uninspected cars terminating there. Coordinators for the grain inspection made estimates of handling time of uninspected cars terminating at these stations. Protestants claim that these estimates were substantially in error. It is their view that 79 hours should be used instead of the coordinator's average estimate of 26 or 27 hours. The 79 hour figure is based upon an unweighted average of the uninspected cars' delay time at the other stations' terminating cars on the railroad's line. This figure, 79 hours,

should not be substituted for the estimate of the coordinators. Protestants' estimate is heavily based on the experience of export grain at Seattle. The cars terminating at these five stations do not contain grain for export. The estimates of the coordinators are considered more acceptable.

However, it is apparent that the study coordinators excluded all constructive placement time from their estimates of handling time for uninspected cars terminated at Clinton, Fremont, Lewiston, Little Rock, and Superior. It is not determinable whether there was a significant amount of constructive placement for these stations. Allowing the total average handling time for these stations to be increased 50 percent would increase the overall like-vs.-like adjustment by less than 5 hours. A reduction in the average delay time from 78 hours would take care of this bias.

There are a number of other alleged deficiencies in the detention study which are referred to and considered in appendix D to the report. They are considered negligible in their impact on the accuracy and reliability of the study. Respondents' detention study is acceptable if estimated average car delay time is reduced to 73 hours from the original figure of 78 hours. The standard error for the delay time is about 8 hours. The study is a probability sample which basically follows the sampling guidelines used in prior proceedings before the Commission. The respondents methodology of using control groups constitutes a statistically valid, credible, and appropriate method for estimating delay time.

There are, as indicated, other studies of record showing the detention time for the in-transit inspection. This service, at the line-haul rates, was eliminated in the East several years ago, so the issue now before us with respect to the eastern railroad respondents is whether the proposed charge is justified from a cost standpoint. These respondents undertook to develop the cost directly attributable to the

holding of cars for grain inspection. The elements of expense primarily relied upon were the detention of the cars, the additional switching and the clerical expense. The great majority of grain inspections in the East are performed on the lines of the C&O-B&O, Norfolk and Western, and Penn Central; and the development of costs was confined to these lines.

These roads gathered sample data from yards providing rain inspection services by esamination of all grain cars entering the yard on particular days. Different time periods were used, but all of the sample periods were designed to be of sufficient size to permit statistically valid analyses.

The difference in "yard throughput" (putting a car through the yard) between inspected and noninspected cars was determined on a conservative basis. The assignable time began with the entrance of a car into the yard on an inbound train and ended either with placement of the car on the consignee's siding, or placement on another train in the case of a nonterminal movement. On this basis, the weighted average difference in car throughput between inspected an noninspected cars amounts to 44.91 hours per car. The difference in car throughput varied from yard to yard and from railroad to railroad, but in every yard where statistical testing was possible there existed a strong statistical significance in the test for difference of means. Every yard tested showed a positive mean difference between inspected car throughput and noninspected car throughput. This indicates both that the detention figures can be used with a high degree of confidence and that dollarization of such detention time is feasible. As shown in a table set forth earlier, the total detention cost to be eastern railroads for inspection amounted to $5.16.

Respondent Burlington Northern[17] conducted seven detention studies entirely separate from the 16-carrier 1968

[17]The studies were instituted by the predecessor companies before merger.

study previously considered. Five were made at former Northern Pacific terminals and two at former Great Northern stations. The Northern Pacific detention study embraced the first 10 months of 1969. For 1,530 inspected cars in this study, the weighted average detention time per car was 102.4 hours. The weighted average detention time per car of 1,112 uninspected cars was only 34.4 hours. Inspected cars, thus, remained at the inspection points an average of 68 hours longer than uninspected cars. That is the detention time shown in the earlier table where the total inspection cost is computed at $7.45. The results at the Great Northern stations show an average detention time per car in a sample of 47 grain cars held at Spokane, Wash., for inspection during the period December 9-15, 1969, to be 109.1 hours while, on the cars not held for inspection during the study period, the average detention time was only 16.2, for a difference of 92.9 hours. At Great Falls, Montana, a similar study for the period June 25-July 1, 1969, shows that cars held for inspection remained an average of 92.3 hours longer than other cars not held for inspection and disposition orders. The car detention costs for this carrier are shown in the indicated table as $13.62 and $13.52, respectively.

It is unnecessary to consider the Burlington Northern studies in greater detail. They are offered by the western railroad respondents as corrobative to the main or primary detention study of the 16 western railroads. We consider the 1968 study of the 16 western railroads as presenting reliable results with respect to car detention attributable to the in-transit inspection in the West.

The switching studies.-The basic study is the one offered on behalf of the 16 western railroad respondents. As earlier shown, the study was based on an analyses of the 11 stations and resulted in a final average switching time of 8.39 minutes per car. The switching study stations were chosen originally from the 18 stations used to determine the car

detention time. However, because of problems associated with the 1-week study (for example, Fremont, Nebr., and Stockton, Calif., had no grain carloads during study week), a number of the stations were eliminated and others substituted. As a result, the sample of stations on the switching is, in part, based on a judgment selection. The comparative volume at the study stations is shown in the following table.

Selected stations and comparative volumes

Line No.	Railroad and study station (1)	1968 volume of cars (loaded and empty)		
		Year (2)	Average week (3)	Study week (4)
1	MILW -- Aberdeen, S. Dak --------	454,296	8,736	9,023
2	ATSF --- Atchison, Kans----------	14,033	270	336
3	CRIP---- Belmond, Iowa[2]----------	2,919	56	197
4	SP ------- Colton, Calif ----------	[1]248,564	4,780	4,669
5	CNW---- Huron, S. Dak----------	92,477	1,778	1,306
6	IC-------- Iowa Falls, Iowa ---------	[1]172,308	3,314	3,310
7	BN ------ Lincoln, Nebr ----------	[1]1,731,151	33,291	[3]37,236
8	UP------- Omaha-Council Bluffs---	463,655	8,916	[3]9,410
9	MP ------ St. Joseph, Mo ----------	155,516	2,991	2,075
10	UP------- Spokane, Wash ----------	129,274	2,486	2,934
11	BN ------ Superior, Nebr ----------	9,314	179	[3]106

[1]1969 annual count of cars handled.

[2]Study week was June 30-July 6, 1970.

[3]Study week in April 1970.

The study period selected was 1 week in November of 1969, but three of the stations were studied during a week in April 1970, and one in July 1970 because of difficulties encountered in November of 1969. The stations studied were well distributed geographically and they constitute a fair representation of the stations originally in the frame of the 217 stations used in the detention study.

Protestants' criticism of the switching study was concerned chiefly with the adequacy of the sample of the traffic and the high nonproductive additive at a few of the

stations studied. Corrections in the study as a result of the criticism decreased the average switching minutes from the 8.74 minutes in the original study. The use of 1 week for a study period has been accepted as appropriate in prior switching studies made by the railroads and conforms to procedures suggested by the Cost Section of the Commission's Bureau of Accounts. The average switching time of 8.39 minutes per car is acceptable as a measure of the time required to move the grain cars to and from the inspection tracks.

The eastern railroad respondents, having in mind the desirability of achieving a geographical spread with variation among points selected as to volume and effort required, presented switching studies at Toledo, Ohio, by the C&O-B&O, at Indianapolis, Ind., by Penn Central, and at East St. Louis, Ill., by the Norfolk and Western. The C&O-B&O study was conducted during the period November 4-6, 1969. B&O grain inspection at Toledo is performed at the Rossford yard, and, is a simple operation involving the switching of inspected cars to a classification track used for that purpose. The time required for the 69 cars moved to the inspected track during the study period average 7.4 minutes switching time per car, including an additive of 22.4 percent for nonproductive time. The operation at the Walbridge yard of the C&O at Toledo is more complicated. Grain inspection at this yard must be performed on a separate track located across the main lines. During the study period the great majority of the traffic moved via Rossford yard and no attempt was made to compute the switching time for inspection at Walbridge.

Penn Central conducted a 3-day study at Indianapolis. Inbound carloads of grain for inspection at Indianapolis arrive either at Big 4 Yard, 11 miles west of Indianapolis, or at Hawthorne yard, in the southwest corner of Indianapolis. Inspections are made either at Hawthorne yard or at Hill yard, just south of Hawthorne yard. Carloads of grain for

inspection arriving at Big 4 Yard for local delivery at Indianapolis are placed, along with other traffic, in a transfer cut to Hill yard which involves a movement of approximately 17 miles. Upon arrival at Hill yard, the cut is classified and the inspection cars are placed on a designated class track for further movement. After classification, noninspected cars are delivered directly to the elevator. The inspected cars must be moved from the class track to the inspection tracks, and then returned to the switching lead for a reclassification and further delivery. The only switching time charged at Hill yard for the inspected cars was for the movement from the classification tracks to the inspection track and return. Cars arriving at the Hawthorne yard are first classified. The grain cars to be inspected are moved to the inspection tracks, returned and reclassified for further delivery. The added switching time for the movement between the classification tracks and the inspection tracks at Hawthorne yard is attributable solely to placing cars for inspection, and this was the only switch engine time included in the study. The extra switching time required was 6.1 minutes per car at Hill yard, and 5.4 minutes per car at Hawthorne yard. In 1968, Indianapolis had about 1,500 inspections, or 5 percent of the Penn Central's total. In 1969, Indianapolis had about 1,900 inspections, or about 10 percent of this carrier's total inspections.

The Norfolk and Western 3-day switching study at East St. Louis involved a more extensive movement than those at either Indianapolis or Toledo. At East St. Louis, the uninspected cars arrive at Middle yard, receive one classification switch, and are then pulled for local delivery or for road train movement beyond. The cars to be inspected are first placed on a designated hold track at Middle yard for accumulation and subsequent transfer to Lower yard. The transfer movement to Lower yard involves the movement of the engine light to the Middle yard. In addition, switching service is required to effect placement on Lower yard

inspection tracks, pulling from Lower yard track, and another transfer movement from Lower yard to Middle yard, the latter being normally preceded by the light movement of the transfer engine to Lower yard for this purpose. A further classification switch at Middle yard is then necessary. The extra classification switching at Middle yard came to 2.90 minutes per car, including nonproductive time. The movement from Middle to Lower yard averaged 5.35 minutes per car, and the return movement averaged 1.91 minutes per car, totaling 7.26 minutes. A conservative method of combining the trips in each direction produced 6.22 minutes per car and this figure was used. the total time for placing and pulling cars at Lower yard averaged 3.34 minutes per car. The addition of the nonproductive factor of 28.04 percent brought the average minutes per car inspected to 12.24, exclusive of the extra classification switching time at Middle yard. Adding this latter time of 2.90 minutes brought the total average time attributable to extra switching for grain inspection to 15.14 minutes per car. The annual volume of inspections on the Norfolk and Western at East St. Louis of 2,853 cars represents almost 10 percent of the carrier's total system inspections.

The three switching studies of the eastern railroads encompassed 141 cars, with an average switching time for inspection of 10.3 minutes per car over and above the time required on cars not held for inspection. At a unit-cost of $0.76206 per switch engine minute, this produced a cost of $7.85 per car.

Test observations at East St. Louis, Toledo, and Indianapolis developed an average of 11.16 minutes of clerical effort per bill rendered. At the clerical wage rate in effect during 1969, this produces a cost of $0.92 per bill. With the inclusion of the car detention cost of $5.16, the total of the three elements of expense amounts to $13.93 per car on the basis of a 4-percent return on investment after Federal income taxes, and $15.96 per car on the basis of a 6-

percent return on car value.

The switching studies by the Burlington Northern (Northern Pacific and Great Northern), like their car detention studies, are submitted to confirm the showing in the 16-carrier study. The studies by the former Northern Pacific were made at the three principal hold points at which the proposed charges would apply, Minneapolis and Duluth, Minn., and Spokane, Wash. Each study embraced 7 straight days of operations in December of 1969. The average chargeable switching minutes per car held for inspection were developed for each of the three study terminals. A weighted average of 4.906 switch engine minutes per car for every grain hold car embraced in the studies was developed. The average was weighted heavily for the experience at Spokane where grain cars held for inspection totaled 340 compared with 66 at eliminate the discrimination, if any, resulting from the assessment of inspection charges at North Dakota points, and the failure to assess similar charges at other points in the West. Also, there is no convincing evidence to substantiate the protestants' allegation that rail inefficiency is responsible for increased car detention.

While we have concluded that the proposed charges are shown to be just and reasonable on the usual basis of review, it is encumbent to consider also the effect of such charges on the national shortage of railroad freight cars. It is not necessary to make specific findings that such a shortage, which at particular periods such as during the grain harvest is critical, actually exists. Shortages have been an annual occurrence for a number of years and there are numerous proceedings before the Commission which establish the fact. The shortage is also accepted as fact by the parties to this record who, as indicated, have argued at length the pros and cons of the effect of the proposed charges on car utilization and car supply.

Respondents state that the overriding consideration in the review of the proposed charges must be increased car utilization. This was the primary objective of the western railroads in proposing the inspection charge and is the apparent reason for the failure of a number of the larger grain and related industries to appear as protestants in this proceeding. The growth of the alternative sampling procedures indicates some progress away from the in-transit inspection. Because of the economic impact of the charges, the approval given herein should accelerate the use of the origin samplers. It is clear from the detention studies that the in-transit inspection results in an unwarranted loss of car availability, and the elimination of the service, or any significant portion of it, will materially increase car utilization. Respondents have introduced evidence showing that the car-days delay due to inspection in 1969 in the West alone amounted to more than 1.5 million. On the basis that a railroad freight car has 261 active car-days per year,[18] the respondents contend that their railroad freight car fleet is reduced by some 6,000 cars because of the delay due to grain inspection. The figures are computed on an average car detention per inspection of 3.25 days, and the total figure may be somewhat inflated. However, there is no question but what the elimination of the in-transit inspection would materially increase the number of available freight cars by several thousand annually.

Another matter not to be ignored is the loss of revenue caused by the reduced car supply due to grain inspections. Western railroads estimate this at more than $10 million annually. The figures supporting this estimate are set forth in appendix A.

Summary.-In the interest of a better understanding of this complex proceeding we restate, in summary, the chief subsidiary findings that lead us to the ultimate conclusion that the considered schedules are just and reasonable.

[18]Derived from a publication of the Cost Section of the Commission's Bureau of Accounts.

1. The official inspection of grain is no longer mandatory with the amendment in 1968 to the Grain Standard Act, and increased railroad freight car utilization was a consideration in that statutory revision. The statutory change coupled with evidence of record that the inspection may be omitted, made at origin, or made at destination, establishes that in-transit inspection is no longer essential to the orderly marketing of grain.

2. Pursuant to orders of this Commission in Docket No. 17000, Part 7, proceedings, a maximum reasonable level of rates on grain in the West was established. The proposed charges when added to the line-haul rates do not exceed the maximum level prescribed. Where they do, the proposed charges do not apply. Approval of the proposed charges will not contravene our prior orders. Thus, the instant proceeding is distinguishable from our decision in *Transit Charges, Southern Territory, supra.*

3. The detention and cost studies presented and discussed establish that the proposed charges are just and reasonable.

4. The establishment of the proposed charges will eliminate at least some of the car detention time due to in-transit inspection and the resultant increased car utilization will make a substantial contribution toward the improvement of the national freight car supply.

Accordingly, we find that the proposed new or increased in-transit charges for inspection of grain at various points in the United States are just and reasonable and otherwise lawful.

It is ordered. That this proceeding be, and it is hereby, discontinued.

APPENDIX A

TABLE 5. — *Respondents' showing of the revenue loss caused by reduced car supply due to grain car inspections*

Line No.	Item (1)	Total amount 1968 (2)	Total amount 1969 (3)
1	Count of inspections	464,164	488,601
2	Delay time----------(days)	3.25	3.25
3	Car days for the year	1,508,726	1,588,157
4	Active days per year	261	261
5	Car lost	5,781	6,085
6	Average trips per year	16.7	16.7
7	Lost car trips (miles)	96,543	101,620
8	Average revenue per car	$344	$344
9	Revelue loss	$33,210,792	$34,957,280
10	Reduction in out-of-pocket costs	$22,289,122	$23,461,262
11	Loss in contribution to overhead	$10,921,670	$11,496,018
12	One standard error would reduce 157,074 days from line 3.	----------	----------
13	Loss in contribution to overhead	$9,784,286	$10,358,634

APPENDIX B

Counts of cars by type of movement

	TN		TS		IF		IR		DH		DI		No data		Total[1]	
	Inspected	Uninspected	Inspected	Uninspected	Inspected	Uninspected	Inspected	Uninspected	Inspected	Uninspected	Inspected	Uninspected	Inspected	Uninspected	Inspected	Uninspected
Spokane		1	84	90					16	6		3			100	100
Chicago					9	45			9	5	64	34	1	2	82	84
Fremont		97	41						59	(-)					100	97
Alton		77	6						85	(3)				4	91	80
Atchison		79									100	17			100	96
Clinton		82							97	(-)					97	82
Belmond		109	9								82	1			91	110
Seattle			34		2	2			52	65	11	49			99	116
Wichita		87	29	2						1	64	11			93	101
Lewiston			95	100							4	(-)			99	100
Superior			13		72	100			13	(-)					98	100
Los Angeles			21	80					30	4	47	13	1	2	98	97
Aberdeen		17	96	83											96	100
Huron			89	112											89	112
Little Rock		11	9	83	5				47	(-)	23	(-)		2	84	94
Fort Worth		41	26	48	1	6			9	3	50	4			86	102
Houston				20							88	80			88	100
Stockton		20		2	2	60					22	19			24	101

[1]Eliminates no data cars.

TN – Through movement on reporting road, no set out.
TS – Through movement with a set out.
IF – Interline forwarded to connecting carrier.
IR – Interline received from connecting carrier.
DH – Delivered on line of reporting road.
DI – Delivered by interchange connection.

NOTE: Parentheses ( ) indicates cases where estimates of handling time were created by judgment rather than from the data collected.

APPENDIX C

Differences between two kind of like-v.-like adjustments in the western car detention study (all times are in hours)

Line No. (1)	Station (2)	Delay time after respondents' like-v.-like adjusments (3)	Delay times for individual categories of cars[1] TS (4)	IF (5)	DH (6)	DI (7)	Differences between respondents' delay time and the within-car-category delay times (column (3) minus column (4) or (5) or (6) or (7), as appropriate) (8)
1	Spokane	84	87	----------	51	----------	-3, +33
2	Chicago	63	----------	78	63	61	-15, 0, +12
3	Fremont	65	----------	----------	----------	----------	----------
4	Alton	54	----------	----------	----------	----------	----------
5	Atchison	76	----------	----------	----------	73	+3
6	Clinton	107	----------	----------	----------	----------	----------
7	Belmond	64	----------	----------	----------	61	+3
8	Seattle	114	----------	145	82	98	-31, +32, +16
9	Wichita	44	40	----------	----------	39	+4, +5
10	Lewiston	85	86	----------	----------	----------	-1
11	Superior	59	----------	53	----------	----------	+6
12	Los Angeles	84	92	----------	82	77	-8, +2, +7
13	Aberdeen	69	64	----------	----------	----------	+5
14	Huron	51	51	----------	----------	----------	0
15	Little Rock	42	68	----------	----------	----------	-26
16	Fort Worth	104	85	107	101	118	+19, -3, +3, -12
17	Houston	105	----------	----------	----------	105	0
18	Stockton	43	----------	98	----------	39	-55, +4

[1]TS – Through movement with an intertrain switch.
IF – Interline forwarded to connecting carrier.
DH – Delivered on the line of the reporting road.
DI – Delivered by interchange connection.

APPENDIX D

Alleged deficiencies in respondents' car detention study

1. Failure to include the time for the grain inspection at origin.

This criticism is not relevant to the purpose of the detention study which is to determine average car delay due to each in-transit inspection on the carrier's tracks. The study is limited to the direct delays at the inspection station based on comparison of inspected cars with a comparable group of uninspected cars.

2. The number of inspected or uninspected cars is so small that no meaningful conclusion could be drawn in numerous instances for the comparisons that are made.

Particular reference is made to Belmond where there are 82 inspected cars and 1 uninspected car in the DI category. However, differing subsample sizes for the sample stations for inspected and uninspected cars for the three categories used is accounted for in the standard error since all cars at each sampled station were randomly selected. (Also, the uninspected cars at Belmond were drawn at a 100-percent rate for the study.)

3. There may be more weekend handling time for inspected cars as compared to uninspected cars; and the study should exclude the detention time for Saturdays and Sundays.

It is not clear whether there is more handling time on weekends for inspected cars than uninspected cars. Even if there were, it would not invalidate the study. A table is set out below showing the total number of inspected and uninspected cars in the sample summarized for day of the week. The ratio of inspected to uninspected cars in the last column indicates that there are proportionately less inspected cars arriving on the weekends than on the weekdays, 0.82 versus 0.91. It is apparent that there could be no upward bias in this case. Also, the delay time for weekends should be included because it is a proper part of the frame.

Total number of cars by day of week[1]

Day of week	Number inspected	Number inspected	Ratio of inspected to uninspected cars
Grand total	1,549	1,750	0.89
Weekend total	437	530	0.82
Weekday total	1,112	1,220	0.91
Saturday	284	343	0.82
Sunday	153	187	0.81
Monday	203	194	1.05
Tuesday	262	236	1.11
Wednesday	178	233	0.76
Thursday	235	256	0.92
Friday	234	301	0.77

[1]Excludes counts of cars for holidays.

4. Handling of the flagrantly unrepresentative results at Alton.

Respondents were criticized for discarding from the sample, three uninspected cars which terminated at Alton and using instead an estimate of 1 hour. The carriers contend that the delay time of minus 32 hours reported for Alton of 54 hours after determining that the high handling time of three uninspected cars was the cause of negative delay time. The substitution of 54 hours appears reasonable and proper. It was developed on the basis of using 1 hour for the switching time and 53 hours for the constructive placement time. If a flagrantly outlandish result for a subgroup turns up which significantly distorts the summary results there are statistical grounds for discarding that result.

5. Failure to discard uninspected cars which produced long detention times.

The statistical rule is that all handling time of every study car inspected or uninspected be included. The one exception is the situation for Alton. The figures for some of the long delayed cars in the sample which happen to be inspected cars hae been established as correct by the respondents. They

properly belong in the study. The frequency table below shows that Alton alone represents a group average which is outlandish. The minus 32 hours is the only figure that can be deemed as being flagrantly unrepresentative.

Frequency distribution of delay times for stations caused by inspection

Average delay time	Number
Total	27
0 – 24	0
25 – 49	3
50 – 74	9
75 – 99	10
100 – 124	4
125 – 149	1

Range of averages: 39 to 145 hours.

6. The sample did not represent situations correctly at certain locations.

The answer is that the car detention study was not meant to obtain valid estimates for any particular subgroups. It was designed to obtain an overall estimate for delay time for the entire station and time frame.

APPENDIX E

Comparative showing of the costs and rates for handling freight cars for the purpose of in-transit grain inspection in the western district (year 1968), (dollars per car).

Line No.	(1)	Respondents: High range costs (2)	Respondents: Low range costs (3)	Protestants' costs (4)	Restated costs (5)
1	Car detention costs	$10.14	$7.28	$7.31	[1]$6.81
2	Switching costs[2]	6.38	6.38	----------	6.38
3	Added clerical costs[3]	.84	.84	----------	.84
4	Cost of backhaul[4]	1.03	1.03	----------	1.03
5	Cost of extra switching	NA	NA	----------	NA
6	Loss and damage costs	NA	NA	----------	NA
7	Total costs	18.39	15.53	[5]7.31	[6]15.06
	Proposed charges:		Eastern district costs		
A	Eastern and southern territory	$14.33	($5.16 car dentention + $7.85 switching costs + $0.92 clerical = $13.93 at 4-percent return)		
B	Western territory (east of Missouri River)	13.78			
C	Western territory (west of Missouri River)	13.36			

[1]Based on corrected data of 3.04 car days additional detention for inspected grain cars — $2.24 per day costs. (Rail Form A at 4 percent return.)

[2]Based on corrected data of 8.39 minutes per inspected car at $0.76070 per minute.

[3]Based on lower range costs from exhibits of record.

[4]Lowest backhaul cost from exhibits of record.

[5]Protestants did not show costs other than detention of car costs.

[6]This cost does not include loss and damage costs, added switching or additional transits for second inspection en route.

INVESTIGATION AND SUSPENSION DOCKET NO 8548 INSPECTION IN TRANSIT, GRAIN AND GRAIN PRODUCTS

Decided January 21, 1975

REPORT AND ORDER OF THE COMMISSION ON FURTHER RECONSIDERATION

O'Neal, Vice Chairman:

In the first report, 339 I.C.C. 364, decided April, 1971, Division 2 found that proposed new or increased charges for the first in-transit inspection of grain and grain products at various points in the United States were just and reasonable and otherwise lawful and entered its order discontinuing the proceeding.

This proceeding was designated as one presenting an issue of general transportation importance. Consequently, after the filing of petitions for reconsideration of the division's report and order and hearing the parties in oral argument, we reopened the proceeding for reconsideration on the record as made. Although the schedules publishing the new charges became effective on May 4, 1971, they will, for convenience, be referred to as the proposed schedules or charges.

On reconsideration, 340 I.C.C. 69, decided September 21, 1971, we affirmed Division 2's earlier findings and found that the proposed new or increased charges for in-transit inspection of grain at various points in the United States were just and reasonable and otherwise lawful. In addition, the respondents were required to submit 6-month reports, beginning October 1, 1971, on a continuing basis, showing the revenues derived from the collection of the proposed charges. We retained jurisdiction to further review the findings in our prior report after receipt of the aforesaid carriers' reports.

In *Grain and Grain Products*, 205 I.C.C. 301, and 215 I.C.C. 83, the Commission authorized and approved the carriers' practice of providing in-transit inspection without charge in addition to the line-haul rate. Prior to the effectiveness of the proposed schedules, separate charges were made for the second and subsequent inspection stops, but not for the first stop except in the eastern territory where a separate charge for such service had been in effect for a number of years. Thus, the proposed schedules provided for increased inspection charges in the eastern territory, new first-stop charges formerly included as part of the line-haul rates within southern, western and Illinois territories, and in some instances changed charges for second and subsequent stops in the involved territories.

Shippers who had objected to the proposed new charges before the Commission sought review of our order, and a statutory three-judge District Court was convened. The opinion of the United States District Court for the District of Kansas, *Wichita Board of Trade v. United States*, 352 F. Supp. 365, decided May 26, 1972, held that the Commission had not adequately justified its failure to follow "its long established rule that it will not allow a separate charge for an accessorial service previously performed as part of the line-haul rates without substantial evidence that such an additional charge is justified measured against the overall services rendered and the overall reasonableness of the increased line-haul rate resulting therefrom ***." 352 F. Supp. 365, 368. After holding that the matter must be remanded to the Commission for further proceedings, the District Court ordered "The proposed charges are suspended and shall be ineffective until and unless otherwise ordered by this Court."

On appeal in the United States Supreme Court, sub nom *Atchison, T & S. F. R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, decided June 18, 1973, the Court held that the Commission did not explain its apparent departure from

precedent in a manner sufficient to permit judicial review of its policies, but that, nevertheless, that kind of error does not justify the District Court in entering an injunction against imposition of the rates pending review of the Commission's action on remand. The action of the District Court was affirmed as to the remand to the Commission and was reversed as to the injunction suspending the proposed charges.

On remand, the Commission, by order dated October 26, 1973, reopened the proceeding for reconsideration on the present record and ordered the parties to file briefs directed to the question of the proper course of action for the Commission now to undertake. Such briefs were ordered to treat, but not be limited to, the legal sufficiency and practical workability of five stated alternatives.

Briefs were filed by respondent railroads; the Secretary of Agriculture of the United States, protestant; and by a number of protestants jointly (See Appendix A) on February 4, 1974. Reply briefs were filed by respondent railroads on March 20, 1974; and by the Secretary of Agriculture of the United States, protestant; and the above noted protestants on March 21, 1974.

There will be no attempt to restate herein the scope of this extended and highly controversial proceeding. The complex factual and legal issues are described in detail in the earlier reports and in the opinions of the District Court and the Supreme Court. As there is no serious challenge to the major portion of the recitation of facts found in the report of Division 2, as modified in the previous report of the Commission, following a careful review of the division's report and order and an analysis of the record in the light of the arguments advanced orally by the parties, we adopt and affirm the findings of fact reached in the previous reports except to the extent modified herein. Further recitations of facts will be for purposes of clarification only.

Our primary purpose in further considering the issues herein is to examine and evaluate said issues in light of the opinion reached by the Supreme Court. As noted by the Court, our previous decisions were premised on two central findings of fact which we unsuccessfully relied on to distinguish the instant proceeding from *Transit Charges, Southern Territory*, 332 I.C.C. 664 (1968), wherein proposed new transit charges covering services previously included under the line-haul rates were found not shown to be just and reasonable. First, we found that the line-haul rates applicable on the grain to, from, and through the inspection points number in the thousands and, because of the complexities of the grain rate structures, vary to a large degree. Second, we found that the line-haul rate applicable to any movement of grain when coupled with the proposed charge is less than the maximum reasonable level determined by this Commission in *Grain and Grain Products, supra*, as increased by subsequent general rate increases. However, the Court found that neither the complexities involved in requiring respondent railroads to affirmatively establish the justness and reasonableness of a vast number of line-haul rates nor the rationale utilized to assume the justness and reasonableness of these rates were sufficient to justify an exception to the off-stated rule that reductions in service require concurrent reductions in line-haul rates, or an affirmative showing of the justness and reasonableness of the line-haul rate at the reduced service level.

On remand, the respondents have alleged that our previous decision should be affirmed on the following grounds: (1) the optional and accessorial nature of the in-transit inspection service; (2) the nonrevenue purpose of the charges; (3) the function and limitations of a section 15(7) proceeding and the availability of other shipper remedies; (4) carriers' freedom to adjust rates within the zone of reasonableness; (5) the Commission's authority to deter-

mine the reasonableness of a rate by noncost criteria; (6) the vitality and use of current maxima as a yardstick to identify the upper level of the zone of reasonableness; (7) the consistency of the Commission's approach with prior precedents and the complete absence of any departure from prior norms; and (8) the importance of the freight car shortage in evaluating the reasonableness of the charges.

While respondents are undoubtedly correct that in-transit inspection need not necessarily be a part of the line-haul service in grain movements by virtue of the 1968 amendment to the Grain Standards Act, this fact is without bearing in the instant case. A reduction in service, whether integral or nonintegral to the basic service, must, under previous Commission decisions, be treated functionally as resulting in increased rates. Inasmuch as the Supreme Court has rejected our attempt to distinguish this proceeding from *Transit Charges, Southern Territory, supra,* including the general rule applied therein, and our repudiation of said rule would not be in the public interest, we have no alternative but to require that the line-haul rates, as increased through a diminution of service thereunder, be justified by appropriate evidence establishing that the aggregate charge for the through service is reasonable. The fact that revenue increase was not one of the stated purposes of the instant proposal and that improvement in service was the primary purpose does not alter the simple fact that the proposal has resulted in increased charges to shippers that must be shown to be just and reasonable.

Respondents' allegations in regard to the limitations of the section 15(7) proceeding are also without application in the instant case. While the 15(7) action is obviously not the only remedy available to shippers, it is the remedy most appropriate to the involved issues. While this proceeding unfortunately has been unusually extensive in terms of time, this alone cannot be the rationale for the Commission to ignore precedents and arbitrarily shift the burden of proof

to protestants by requiring them to take recourse through the filing of complaints under section 13(1). Notwithstanding, that the involved rates have become effective, protestants retain the right to have the involved rates treated as proposed rates and respondents retain the burden of proof in establishing that these rates are just and reasonable and otherwise lawful. This does not limit the carriers' freedom to adjust rates within the zone of reasonableness. It is simply a requirement that respondents must affirmatively show that the adjustments are within the zone. Of course, should relief in addition to that which is provided in this report and order be desired by protestants, action under section 13(1) of the act must be commenced.

While the affirmative establishment of justness and reasonableness need not be based on revenue cost relationships, the Commission may not arbitrarily fashion a standard out of whole cloth. Respondents have the obligation to establish that the standard desired is rational and that they have in fact met the standard proposed. It is not the duty of the Interstate Commerce Commission to develop standards for decision making based solely on the needs and/or desires of particular respondents. The use of comparisons of the proposed rates at the reduced level of service with the rates established as maxima 40 years ago has been rejected by the Supreme Court, and the cases in support of the general rule cited by the Court and cited in this report may not be distinguished in the manner suggested by respondents. The distinctions drawn by the respondents between those cases and this proceeding are not sufficient to warrant departing from precedent.

While improvement in car utilization is a singularly important goal today, no showing has been made that the economic disincentive attached to a separate in-transit inspection charge would not be equally effective if the line-haul rates are reduced to reflect the reduction in service. In terms of percentages, the cost of the in-transit charge is

increased if the line-haul rate is reduced. In terms of the dollar value of the disincentive, there is no difference whether it is added to the current line-haul rates or added to reduced line-haul rates.

As the distinguising characteristics of the instant case, as presented by respondents, are insufficient to allow an exception to be made to the involved rule as stated in *Terminal Charges at Pacific Coast Ports*, 255 I.C.C. 673 (1943), *Unloading Lumber at New york harbor*, 256 I.C.C. 463 (1943), *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954), *Transit Charges, Southern Territory*, 332 I.C.C. 664 (1968), and *Charges at New York Harbor, Penn Central Transp. Co.*, 344 I.C.C. 21 (1972), we must find that proposed new charges for the first stop for in-transit inspection of grain at various points in the United States outside the eastern territory are not shown to be just and reasonable and otherwise lawful.

Within the eastern territory, the applicable charge[1] for the first stop was $7.42 prior to the involved increase, and was $13.29 for the second and subsequent stops. As noted in the report and order of Division 2, *supra*, at 339 I.C.C. 364, 366, the proposed per-car charge for each stop within the eastern territory is $14.33. This charge is within the zone of reasonableness as determined in our previous reports and, as no reduction in line-haul service is involved in the eastern territory, we reaffirm our earlier finding that the proposed increased charges for in-transit inspection of grain at various points within the eastern territory are shown to be just and reasonable and otherwise lawful.

For points outside the eastern territory subject to the involved proposal, separate charges for in-transit inspection for the second and subsequent stops have also existed for a number of years. As the charges proposed for all points outside the eastern territory for second and subsequent

[1]Charges stated herein are subject to authorized general increases subsequent to Ex Parte No. 262, *Increased Freight Rates, 1969*, 337 I.C.C. 436.

stops are within the zone of reasonableness as determined in our previous reports and as no reduction in line-haul service is involved with these charges, we reaffirm our earlier finding that the proposed charges for second and subsequent stops for in-transit inspection of grain at various points in the United States are found shown to be just and reasonable and otherwise lawful.

Despite the extended litigation in the involved proceeding, the areas of agreement between the parties are quite large. Respondent railroads view the separation of in-transit inspection charges from the line-haul rates as part of their efforts to alleviate the recurring shortage of freight cars available to serve the Nation's shippers. See generally, *United States v. Allegheny-Ludlum Steel*, 406 U.S. 742, 745 (1972). Revenue increases are not desired as a result of the proposal.

The proposal has, based on traffic and revenue data contained in the carriers' reports filed with the Commission during the first five 6-month reporting periods, proven to be an effective deterrent to in-transit inspection. Percentages of cars utilizing the service have declined from approximately 55 to 60 percent for the year prior to the effective date of the proposal to 20 to 25 percent for the reporting periods after the proposal became effective. However, the charges collected during the five reporting periods have accrued in amounts approximating $7.6 million. Additionally, the annual rate of collections is increasing rapidly. For the year October 1971, to September 1972, the charges totaled in excess of $2.2 million. For the 12-month period October 1972 to September 1973, the charges totaled in excess of $3.4 million. For the 6-month period October 1973 through March 1974, the charges totaled in excess of $1.96 million, an increase over $400,000 from a similar period a year before and an increase of over $700,000 from a similar period 2 years before.

The protestants do not argue against the imposition of a separate in-transit inspection charge. They appear to concede that the separate charge creates an economic disincentive to the utilization of this service. However, protestants are concerned with the large amounts of money they are paying annually under the new charge and maintain that in effect they are being forced to pay twice for the same service.

As respondents have been unable to affirmatively demonstrate the justness and reasonableness of the line-haul rates at the reduced level of service, it is clear that if the in-transit inspection charge is to be maintained as a separate charge a reduction must be made in the line-haul rates. The obvious difficulty in so doing is that the same multiplicity of rates that made proof of justness and reasonableness difficult also makes a proper rate reduction difficult. The reductions must be equal to the total charges applicable to the service but should not be so large as to cause an unwarranted revenue loss for respondents.

We believe that a proper percentage rate reduction commensurate with the reduction in service may be determined in the following manner:

1. The proposed charge should be determined at a just and reasonable level in light of the cost of service in year x, a year to be chosen by respondents. Cost of service should be determined in a manner consistent with the determination made in the report of Division 2 at 339 I.C.C. 364, 399, 407.

2. The percentage of shipments given first in-transit inspection outside the eastern territory in the 12 months preceding the effective date of the separate in-transit inspection charge should be determined.

3. The number of shipments made under the involved line-haul rates in year x should be determined.

4. The total line-haul revenue for involved movements for year x should be determined.

5. The percentage determined in 2 should be multiplied by the number arrived at in 3 to determine the approximate number of movements that would have been given first in-transit inspection in year x in the absence of the separate charge.

6. The figure arrived at in 1 should be multiplied by the figure arrived at in 5 to determine the total amount of the required reduction in all line-haul revenues.

7. The figure arrived at in 6 should be divided by the figure arrived at in 4 to determine the percentage reduction in present line-haul rates necessary to compensate the shippers for the reduction in service.

A master tariff listing this percentage reduction in line-haul rates for the future would be sufficient until such time as new tariff schedules are published making individual adjustments in the involved rates. To insure fairness to all parties, increases in the in-transit inspection charges, other than general freight rate increases, filed within 1 year from the effective date of the proposed charge must be accompanied by a corresponding reduction in the line-haul rates. We believe that this requirement will lead to the most accurate evaluation of the proper level of charges under paragraph 1 of the above formula.

Protestants allege that as any individual shipper had the right under the old line-haul rate to in-transit inspection, and since the new tariff publications eliminate this right, the entire value of this service should be subtracted from each line-haul rate. As it is apparent that only a given percentage of the shippers in any year would avail themselves of the right to in-transit inspection, it is fair to assume that the total cost to the railroads for providing this service was spread over all line-haul rates and thus each shipper has never been charged the total value of the service he had the option of using. The elimination of the service from the line-haul rate and the concurrent reduction of the rate by a

percentage determined in the manner hereinabove described, would be equitable to all parties. Shippers not utilizing the service will not be bearing part of the burden for those who do, and shippers utilizing the service will be paying only a just and reasonable charge.

SUMMARY

1. The detention and cost studies presented and discussed in the report of Division 2, establish that the level of charges proposed is commensurate with the cost of service provided.

2. The establishment of the proposed new charges for the first stop for in-transit inspection of grain at various points in the United States outside the eastern territory has, and will in the future, eliminate at least some of the car detention time due to in-transit inspection, and the resultant increased car utilization will make a substantial contribution toward the improvement of the national freight car supply.

3. The reduction in service caused by the elimination of in-transit inspection privileges from line-haul service require either a showing of the justness and reasonableness of the line-haul rates for the reduced level of service or, in the alternative, a commensurate reduction in the line-haul rates.

4. In the absence of an affirmative showing of the justness and reasonableness of the line-haul rates, and in the absence of a reduction in the line-haul rates, the imposition of proposed new charges for the first stop for in-transit inspection of grain at various points in the United States outside the eastern territory has not been shown to be just and reasonable and otherwise lawful. This finding is without prejudice to a refiling in the manner hereinabove mentioned.

5. As there is no reduction in the line-haul service within the eastern territory, and as the proposed increased charges have been shown to be at a just and reasonable level, we find that the proposed increased charges for in-transit inspection of grain at various points within the eastern territory are shown to be just and reasonable and otherwise lawful.

6. As there is no reduction in the line-haul service involved in the proposed charges for second and subsequent in-transit inspection charges outside the eastern territory, and as the proposed charges have been shown to be at a just and reasonable level, we find that they are shown to be just and reasonable and otherwise lawful.

7. Since the assessment of the new in-transit inspection charges, if refiled, would be offset by a reduction in the line-haul rates, it is not now appropriate to make a determination as to whether the revenue from those charges should be used by the respondents to upgrade their freight car fleet and accordingly we make no such determination. Therefore, the records and reports required by the Commission's Report and Order of September 21, 1971, need no longer be maintained and filed.

8. This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

COMMISSIONER GRESHAM, concurring, in part:

While I concur with the findings made herein, I cannot be shown as joining the majority in their proposed method for determining the rate reduction and refiling the proposed new charges for the first stop for in-transit inspection of grain at various points in the United States outside the eastern territory.

COMMISSIONER MURPHY, dissenting, in part:

Although I am in agreement with the majority insofar as it would find the proposal just and reasonable except for the charge for the first inspection in the western district, I cannot in good conscience join the majority in that exception. All parties to this proceeding and even the courts recognize the principal reason for the new charge in the western district, i.e., an improvement in the car supply. The record, including the periodic reports filed by the respondents, clearly indicates that the proposal has resulted

in a substantial reduction in the inspection of grain which inspection may delay a car for up to 3 days.

However, notwithstanding this important improvement in the car supply, the majority would now order the cancellation of the proposed increase for the first inspection in the western district with a suggested complicated formula and a somewhat ambiguous procedure for establishing such a new charge. There is no assurance that the respondents, if they chose to follow the suggested procedure, will not encounter problems similar to those which beset them in defending their proposal herein. Moreover, in that respect, respondents should be forewarned by the candidness of certain protestants which indicate that upon cancellation of the disputed proposal respondents would have the managerial prerogative to file new schedules after they have amassed appropriate evidence and with the public afforded the opportunity to challenge the new proposal.

As noted previously, the suggested formula and procudure may create insuperable problems. The majority suggests use of a master tariff as a device to establish two levels of rates, one showing the line-haul rate including the full service, the other (the master tariff) containing a percentage reduction from the line-haul rates to reflect the elimination of the inspection service. The establishment of such a master tariff will further complicate the endeavors of this Commission in encouraging respondents to update their tariffs. But there is a possible further and more serious problem. Normally, the farmer receives payment for this grain at the elevator which includes the market price less the elevator operator's commission and the total rail charges to the market. Assuming that this sequence is followed and the grain is purchased by a dealer who subsequently determines not to have an inspection in transit, the reduction from the line-haul rate as contemplated by the suggested master tariff technique would go to the holder of the shipping documents, not the farmer. The Secretary of Agriculture

has vividly portrayed the plight of the farmer in similar circumstances.

As mentioned, many of the protestants point to the substantial reduction in grain inspection since the effectiveness of the schedules herein, bemoan the fact that respondents have secured some revenues from those shippers desiring an inspection, but, more importantly, fail to disclose to what extent they still request and require inspection in transit. Without this information, it is impossible to determine to what extent those protestants are adversely affected by the proposal. In light of the beneficial aspects of the proposal on the car supply and in light of the repeated criticisms relating to service as expressed by shippers and others in many of the recent general increase proceedings, protestants should welcome the opportunity and step forward with suggestions to implement the proposal and not with a simple request for a cancellation thereof. In that respect, Rule 42(a) of the General Rules of Practice, 49 CFR 1100.42(a), offers some guidance. The protest should state, among other things, "what protestant offers by way of substitution." The responses of protestants herein, unfortunately, fail to adequately meet that goal, including a failure to show how protestants will improve the car supply should the schedules be canceled.

In summary, I would approve the proposal in its entirely since it is in the public interest.

It is ordered, That as the proposed new charges for the first stop for in-transit inspection of grain at various points in the United States outside the eastern territory are not shown to be just and reasonable and otherwise lawful, the respondents herein be, and they are hereby, notified and required to cancel the applicable schedules as described in the order of the Commission's Board of Suspension entered on March 25, 1970, on or before 60 days from the date of service of this report and order, upon not less than 1 day's

notice to this Commission and to the general public by filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, without prejudice to the filing of new schedules in conformity with the above-stated conclusions.

And it is further ordered, That this proceeding be, and it is hereby, discontinued.

APPENDIX A

Protestants filing briefs on remand

Board of Trade of the City of Chicago

Board of Trade of Kansas City, Missouri

Bunge Corporation

C-G-F-Grain Company, Inc.

California Grain and Feed Association

Cash Grain Association of the Chicago Board of Trade

The Denver Grain Exchange Association

Enid Board of Trade

F.S. Service, Inc.

Far-Mar-Co., Inc.

Forth Worth Grain Exchange

Garvey Elevators, Inc.

Garvey Grain, Inc.

Hollander & Feuerhaken

The Hutchinson Board of Trade

Kansas City Grain Commission Men's Association

Kansas Grain & Feed Dealers Association

Lincoln Grain, Inc.

Los Angeles Grain Exchange

Master Grain Company

Merchants' Exchange of St. Louis

Midwestern Grain Company-Division of
Garnac Grain Co., Inc.
Missouri Department of Agriculture
Missouri Farmers Association, Inc.
Mohr-Helstein Commission Co.
National Association of Wheat Growers
National Grain and Feed Association
National Grain Trade Council
Omaha Grain Exchange
Pacific Northwest Grain Dealers Association, Inc.
Peoria Board of Trade
Producers Grain Corporation
St. Joseph Grain Exchange
Sioux City Grain Exchange
State Corporation Commission of the State of Kansas
Stotler & Company
Utah-Idaho Grain Exchange
The Wichita Board of Trade

INVESTIGATION AND SUSPENSION DOCKET NO. 8548

INSPECTION IN TRANSIT, GRAIN AND GRAIN PRODUCTS

Decided February 9, 1979

DECISION

BY THE COMMISSION:

INTRODUCTION

This proceeding involves charges levied by the western railroads for stopping and setting aside cars so that grain may be inspected on its way to market, a service previously performed under the line-haul rate. We twice approved these charges,[1] which were not put into effect until we had found them no more than necessary to compensate the carriers for the extra operations performed.[2]

However, the Supreme Court remanded this proceeding to us for explanation of why we had not required the railroads, as we had in the past, to show by substantial evidence both that the line-haul rate was inadequate to cover the separate service[3] and that the new aggregate rate[4]

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[1] *Inspection In Transit, Grain and Grain Products*, 339 I.C.C. 364 (April 1971); 340 I.C.C. 69 (September 1971).

[2] See *Inspection In Transit, Grain and Grain Products, 339 I.C.C. at 398-99, 401, 407; 340 I.C.C at 71-72; and 349 at 97. These charges were put into effect May 4, 1971. 340 I.C.C. at 69 and 70; 349 I.C.C. 89 (1975).*

[3] "***reductions in service require concurrent reductions in line-haul rates, or an affirmative showing of the justness and reasonableness of the line-haul rate at the reduced service level." 349 I.C.C. 92.

[4] Composed of the line-haul rate plus the inspection-in-transit charge.

represented a just and reasonable rate for all of the services rendered.[5]

On remand, we decided that there was insufficient justification for our departure from prior precedent and found the new charges not shown to be just and reasonable.[6] Accordingly, we ordered the tariffs containing those charges canceled. With respect to further relief, we stated:

[s]hould relief in addition to that which is provided in this report and order be desired by protestants, action under section 13(1) [now section 11701] of the act must be commenced.[7]

On September 5, 1975, the Secretary of Agriculture, pursuant to 49 U.S.C. 15(7)[8] [now 49 U.S.C. 10708(b)] petitioned the commission for refund of those charges which had been collected. By decision dated November 12, 1975, we summarily denied the Secretary's request.

Upon review of this denial, the United States Court of Appeals for the District of Columbia remanded the case to the Commission "to consider the Secretary's request and announce its decision in a reasoned opinion."[9] The court stated that, should the Commission decide not to issue a refund order, but to allow individual petitioners to proceed

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[5]*Atchison, T. & S. F. R. Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800 (1973). The eastern carriers were not required to undertake the same proof because they had some years earlier separated charges for first stop-in-transit services from the rates for grain transportation. Thus our approval of a substantially identical level of charges published by the eastern railroads for the same services was upheld.

[6]*Inspection In Transit, Grain and Grain Products*, 349 I.C.C. 89 (1975).

[7]*Id.* at 93.

[8]That section provides, in pertinent part, that the Commission "may***require***carriers to refund***such portion of such increased rates or charges as by its decision shall be found not justified."

[9]*Secretary of Agriculture of U.S.* v. *I.C.C.*, 551 F. 2d 1329 (C.A.D.C. 1977).

under section 13(1) (now section 11701) of the Interstate Commerce Act. "it should spell out what will be required for relief under section 13(1)."[10]

Meanwhile, in response to the motion of certain shippers, the District Court for the District of Kansas ordered the railroads to refund those charges collected during the time the Supreme Court had stayed that court's previous order requiring the railroads to cancel the tariffs containing the charges.[11]

Upon appeal, the Supreme Court vacated the order and remanded the case to the district court with directions to remand it to the Commission for further consideration [433 U.S. 902 (1977)]. On August 22, 1977, the district court remanded the cause "for further consideration of the issues of fact and law involved therein in connection with its reconsideration of the case of *Secretary of Agriculture v. Interstate Commerce Commission*, 551 F. 2d 1329 (D.C. Cir. 1976)[12] on remand from the United States Court of appeals for the District of Columbia Circuit.

On October 21, 1977, the Commission consolidated for consideration the remands in *Wichita Board of Trade, et al. v. United States, et al.*, 352 F. Supp. 365 (D.C. D. Kans. June 29, 1977) and *Secretary of Agriculture of U.S. v. I.C.C.*, 551 F. 2d 1329 (D.C. Cir. 1977), and reopened the record for the receipt of written briefs addressing the question of whether a refund order should issue.

Briefs addressing this issue were filed by the railroads

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[10] *Id* at 1331.

[11] *Wichita Board of Trade, et. al.* v. *United States, et al.*, civil action No. W-4730 (U.S.D.C.D. Kans., February 23, 1977). The Court's stay order was in effect from July 7, 1972 to June 18, 1973, and contained a keep account provision.

[12] Order entered August 22, 1977, in civil action No. W-4730. *Wichita Board of Trade, et al.* v. *United States, et al.*

(carriers or respondents), by the Wichita and other Boards of Trade (Boards of Trade) and by the Secretary of Agriculture. In the following portion of this decision, we will address the issues raised by the parties. Those matters raised but not discussed in this decision have been considered and their discussion deemed unnecessary for the proper disposition of this proceeding.

Two preliminary matters warrant attention.

1. In section III of their brief the railroads attempt to argue that the in-transit inspection charges are just and reasonable. We have already determined that those charges have not been shown to be just and reasonable.[13] That issue may not be relitigated. The Secretary of Agriculture's motion to strike this material is granted. We agree with respondents, however, that the fact that the charges in issue are no higher than those approved for use and being charged by the eastern railroads is relevant in determining the "equities of restitution" as we have done in this proceeding. See pp. 629-35 *infra*.

2. The position of the Boards of Trade.

The Boards of Trade represent themselves as "conduits" passing refunds along to others. However, from their supporting affidavits it is clear that in many instances they would pass through the refunds only to the country elevator rather than to the farmer who actually bore the charges.[14]

The Boards of Trade also maintain that once the district court ordered the commission's report and order set aside, "the railroads were on notice that their rates were presumptively unlawful."[15] This is simply not so. The

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[13]*Inspection In Transit, Grain and Grain Products*, 340 I.C.C. 69 (1971).

[14]See discussion p. 636 *infra*.

[15]Brief of Wichita Board of Trade, et al., on remand, filed November 21, 1977, p. 13

question of the justness and reasonableness of these charges is exclusively within our province. The district court's decision could create no presumption regarding this issue. That the district court's decision created no presumption is obvious from the terms of the Supreme Court's initial remand which, following that decision, left open the possibility that we might once again approve the charges.[16] Until we acted, the railroads were under no notice that their charges were unreasonable.

The Boards of Trade's reliance in *Zuber v. Allen*[17] is misplaced. *Zuber* involved a case where a district court invalidated a farm location differential created by the Secretary of Agriculture. As the decision was merely one of statutory construction, the district court was able to render a final decision on the merits of the differential. Once such a "final judgment"[18] was rendered invalidating higher payments to farmers nearer the market, refunds were

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[16] *Atchison, T. & S. F. R. Co.* v. *Wichita Bd. of Trade, supra*, see footnote 5, especially p. 817 footnote 12. See also p. 824: "Inspections will continue to be made. *If the Commission approves the new charges*, there will be a separate charge for them, either by the railroads under the new charges, or by someone else engaged in marketing grain." [Emphasis supplied.] The Supreme Court's initial remand also suggested that we might decide the issue precisely as we have—by finding the new charges not shown to be just and reasonable and ordering them to be canceled, but requiring individual complaint actions to be brought for recovery where such can be shown to be justified. See p. 636 *infra*.

[17] 396 U.S. 168 (1969).

[18] *Zuber, supra*, see footnote 17, at 197.

appropriate. The Supreme Court, therefore, approved the district court's award to nearby farmers of escrow monies collected prior to final judgment of the district court and to the more distant farmers, payments collected subsequent to that date. The Court stated:

> The Court below struck an equitable balance in awarding to petitioners, nearby farmers, all escrow monies collected prior to entry of final judgment by the District Court. This is a fair solution and one this Court will not disturb.[19]

In *Wichita Board of Trade v. United States*[20] the district court could not render a "final judgment" on the merits of the charges involved. If the point of "equitable balance" between the parties does not occur until a "final judgment" on the merits is reached, then it was not reached in this case until our decision declaring the charges not shown just and reasonable. This fact was made clear by the Supreme Court in its initial review in this proceeding as a result of which it vacated that portion of the district court's order which would have had the effect of canceling the charges under consideration.[21]

More importantly, and as apparently recognized by the Supreme Court's order, the question of whether refunds are appropriate under the particular circumstances of this case, like the question of the reasonableness of the charges themselves, falls within the primary jurisdiction of the Commission. See *Moss v. Civil Aeronautics Board*, 521 F. 2d 298, 308-309, 314-315 (D.C. Cir. 1975), cert. denied *sub nom. Roberts v. Civil Aeronautics Board*, 424 U.S. 966

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[19] *Ibid.*

[20] 352 F. Supp. 365 (D.C. Kans. 1972).

[21] *Atchison, T. & S. F. R. Co.* v. *Wichita Bd. of Trade, supra* see footnote 5, at 817-826. See *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658 (1963); *United States* v. *SCRAP*, 412 U.S. 669, 690-699 (1972).

(1975); *Southern Ry. Co. v. United States*, 412 F. Supp. 1122, 1147-1148 (1976); Cf. *Secretary of Agriculture v. United States, supra.*

These parties seek refund only of those monies collected during the stay of the district court's order requiring cancellation of the charges. They point to certain differences between their suit before the district court (the *Wichita Board of Trade* case) and the petition of the Secretary of Agriculture to this Commission (the *Secretary of Agriculture* case):

1. The periods covered by the two requests differ.[22]

2. The Secretary of Agriculture's petition is directed to our statutory authority to order refunds under section 15(7) of the act. In the *Wichita Board of Trade* case our duty is to advise the district court as to the equitable disposition of those monies under its control.

In sum, they argue that the remands from the two courts cover different periods and that our role is adjudicatory in the one instance and advisory in the other. It is unclear from the Boards of Trade's brief whether they think these distinctions compel a different result in the two cases. We do not think that they do. We are deciding the Secretary of Agriculture's petition upon a balancing of the "equities of restitution" as required by the remand from the United States Court of Appeals for the District of Columbia Circuit. Bearing in mind that we are free under the terms of that remand to either grant or deny the Secretary's petition, we have taken a hard look at the arguments presented by all parties on brief and have concluded that a blanket refund would not be appropriate under the circumstances of this

[22]The Supreme Court's stay covered the period from July 7, 1972 to June 18, 1973. The period covered by the Secretary's petition includes the time from the date the railroads initially placed the rates into effect, May 4, 1971, to the date of the stay's issuance, plus the period from the end of the stay to March 28, 1975, when the charges were ultimately canceled by the railroads.

case for reasons set forth at pages 629-35 *infra*. The same considerations, we believe, compel denial of the motion for refunds pending before the district court.

The Boards of Trade emphasize that the Court's stay order required the railroads to keep account of the monies received under the charges so that they might refund them, with interest, should the Court later affirm the district court's order suspending those charges. But the Court did not later affirm the district court's order suspending those charges. Rather, it reversed that order.[23]

If the Supreme Court had intended its "keep account" order to operate automatically, the Court could simply have ordered refunds for the period of its stay order. Instead, it sent the *Wichita Board of Trade* case back to us for consideration in connection with the Secretary of Agriculture's petition which covers the period when the stay order was not in effect. We think that refund of all charges, whenever collected, are governed by the same equitable considerations,[24] which, for reasons set forth in the *Moss and Southern Railway decisions, supra*, are within the primary jurisdiction of this Commission.

DISCUSSION AND CONCLUSIONS

For the purpose of a rate's effectiveness, there is no difference between a finding that a rate is unjust and unreasonable and a finding that a rate has not been shown

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[23] *Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade, supra*, see footnote 5, at 817-826.

[24] The Court's stay order provided that:

In the event this Court's action should be other than affirmance of the result reached by the District Court, this Court may make such further order concerning the disposition of the aforesaid amounts as the Court may deem appropriate.

In its remand the Court directed the district court to learn what this Commission deemed a proper disposition of these funds under the circumstances.

just and reasonable. As a result of either finding the rate will be disallowed and may not thereafter be collected.

However, with respect to reparations and refunds these two types of decisions are remarkably different. As a result of the first, reparations are usually awarded: when the rates are demonstrated to have been unreasonable when imposed, the money collected must be paid back.[25] In the case of the second finding, i.e., that a rate has not been shown just and reasonable, refunds are the discretion of the Commission.[26]

In exercising that discretion, we will look at the equities of restitution:[27]

A. We note that the carriers relied on our judgment when putting these charges into effect. The 7-month suspension period expired on October 29, 1970. However, the railroads voluntarily postponed the effective date of these charges until May 4, 1971,[28] or for over 6 additional months, until we had completed our investigation and adjudged these charges just and reasonable.[29] On September 21, 1971, we

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[25]It is not entirely clear whether reparations automatically issue upon a finding that a rate is unjust and unreasonable. Compare *Potomac Electric Power Co.* v. *Penn Central*, 359 I.C.C. 222, 241 (1977) and *William Volker & Co. of Texas* v. *Atchison, T. & S. F. Ry.*, 318 I.C.C. 249, 271 (1962)—reparations are at the Commission's discretion; with *A.S.G. Industries, Inc.* v. *United States*, 548 F.2d 147, 152 (1977); ASG *Industries Inc.* v. *Aberdeen and R. R. Co.*, 355 I.C.C. 1, 5 (1977)—reparations are automatic.

[26]The Commission's authority to order a refund under section 15(7) [now 49 U.S.C. 10708(b)] is discretionary. *Atchison, T. & S. F. Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800 at 817-826, especially at 824, 93 S. Ct. 2367; *Secretary of Agriculture of U.S.* v. *I.C.C.* 551 F. 2d 1329, 1330-1331 (D.C. Cir. 1977).

[27]See *Moss, supra*, 521 F. 2d at 308; "We have concluded that the Board correctly focused on the equity of restitution and not just the reasonableness of past rate." *Southern Railway, supra*.

[28]340 I.C.C. 69, 70; 349 I.C.C. 89.

[29]See footnote 2, *supra*.

again approved their lawfulness.[30] The district court's reversal of our order was not notice to the carriers that we might withdraw that approval. The Supreme Court, in remanding this case, by no means directed us to find these charges unlawful, and our order reopening this proceeding encompassed the possibility that we would once again approve them. The carriers promptly canceled these charges after we reversed our previous finding of reasonableness.[31] These charges, then, merely provided reasonable compensation for the separate service performed,[32] were collected by the carriers in reasonable reliance upon our explicit approval of them, and were canceled when that approval was withdrawn. To the extent that we were mistaken as to their lawfulness, the consequences of our error should not be visited upon the railroads.[33]

This situation is quite distinct from circumstances in which the Commission has given the carriers notice that the rates they are about to collect exceed or may be found to exceed a reasonable maximum level.

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[30] *Ibid.*

[31] That the charges themselves are reasonable is essentially undisputed. At issue was whether following imposition of these charges for the first time, the line-haul rate as effectively increased thereby could be found to be just and reasonable. On remand, we found that such rates as increased by imposition of the new charges for inspection in transit were not shown just and reasonable. *Inspection in Transit, Grain and Grain Products,* see footnote 6, *supra.*

[32] See footnote 2, *supra.* As noted above, the reasonableness of the charges themselves is essentially undisputed. Substantially identical charges have been approved for use and are being collected by the eastern railroads.

[33] See *Moss* v. *C.A.B.*, *supra*, see footnote 27, at 314-315.

> The fares in question were charged by the carriers in reasonable reliance on the Board's explicit approval of them. To the extent that the Board was mistaken about the lawfulness of the filing, the consequences of that mistake should not be visited upon the carriers, certainly absent any actual unjust enrichment.

The classic example of such a situation occurred in *Middlewest Motor Freight Bureau v. United States.*[34] In that case the commission ordered increased rates canceled as not shown just and reasonable.[35] The carriers obtained a 16-day stay of that order during which they continued to charge the increased rates. Following termination of that stay, shippers sued for reunds of excessive charges and the court was called upon to decide whether shippers might receive restitution of those monies collected in excess of a maximum reasonable level during the period of the temporary restraining order.

The court very carefully limited its holding to the period following the Commission's order[36] and observed that, while the temporary restraining order was in effect, the carriers charged higher rates:

not in compliance with a Commission order, but in spite of that order and only by use of judicial restraint subsequently held to have been improvidently granted.[37]

It ordered restitution as:

the proper remedy to return the parties to the position they

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[34]433 F. 2d 212 (8th Cir. 1970) cited below as *Middlewest.*

[35]*LTL Class Rates & Minimum Charges—Midwest and Central,* 325 I.C.C. 106 (1965).

[36]In discussing the lawfulness of the tariffs involved, the court restricted its holding as follows:

> Nor does this holding imply that the tariffs were unlawful in any sense *prior* to the Commission's final order [emphasis the court's]*** The conclusion that the tariffs were unlawful is restricted to the sense that by virtue of the Commission's cancellation order, *as it operated prospectively*, the carriers no longer had the right to maintain that particular tariff; maintenance of the tariff in violation of the order was unlawful. [Emphasis supplied 433 F. 2d at 222.]

[37]*Middlewest, supra,* see footnote 34, at 230.

would have been in had the Commission's order not been judicially restrained.[38]

This was a case, then, in which the commission's order gave the carriers clear notice that the rates they continued to charge by virtue of the temporary injunction exceeded a maximum reasonable level. Reparations were appropriate and "merely [gave] effect to the Commission's order of cancellation."[39]

A similar situation arose in *Admiral-Merchants Motor Freight, Inc. v. United States.*[40] Increased rates were investigated but not suspended and the carriers collected them during the period of investigation. The carriers requested postponement of the hearing date and the Commission conditioned that delay upon the carriers' refunding to the shippers any increases collected after the original hearing date and later found not shown just and reasonable. In its report and order of the following year, the Commission found the increased rates not shown just and reasonable and ordered refunds. The carriers sued to annul the refund portion of the Commission's order.

The court refused annulment because the carriers had accepted the condition of refund in order to obtain the postponement, and the Commission had delayed the hearing in reliance upon that acceptance.[41]

Once again, the Commission's order clearly alerted the carriers that should they choose to collect increased rates (i.e., not voluntarily postpone the effective date of the schedules) before the Commission had completed its investigation, and should they not sustain their burden of showing the increased rates were just and reasonable, refund would follow.

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[38] *Middlewest, supra,* see footnote 34, at 224.

[39] *Middlewest, supra,* see footnote 34, at 234-5.

[40] 321 F. Supp. 353 (D.C. D. Colo. 1971) cited below as *Admiral-Merchants.*

[41] *Admiral-Merchants, supra,* see footnote 40, at 360.

In *Flores v. Texas & N.O.R. Co.*,[42] *International Multifoods v. A., T. and S. F. Ry. Co.*,[43] and *Burrus Mills, Inc. v. Atchison, T. & S. F. Ry. Co.*,[44] the carriers chose to put rates into effect following their suspension but before completion of the Commission's investigation. They were therefore on notice that the rates they were collecting might later be found not shown just and reasonable and subject to refund at the Commission's discretion or to reparations in a later complaint proceeding. Indeed, when ordering reparations in both *International Multifoods* and *Burrus Mills* the Commission pointed out that:

***in the circumstances presented herein, defendants acted at their peril in pemitting the cancellation of the absorption provision to become effective during the pendency of a Commission investigation of their lawfulness.[45]

Similarly, in *Atchison, Topeka and Santa Fe Railway Co. v. I.C.C.*[46] the commission found increased rates on fresh fruits and vegetables not shown just and reasonable and ordered them canceled. Its order, issued at the end of the suspension period, could not take effect for 30 days.[47] The carriers obviously acted at their own risk in collecting the rates during the 30-day period and the Commission's order directing refunds of the monies so collected was upheld.[48]

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[42]316 I.C.C. 440, 442 (1962).

[43]343 I.C.C. 373 (1973), cited below as *International Multifoods*.

[44]Decision of Review Board No. 4 dated June 15, 1973, served July 6, 1973, served July 6, (No. 35456, unreported), cited below as *Burrus Mills*.

[45]*International Multifoods, supra*, see footnote 43, at 376-7, *Burrus Mills, supra*, see footnote 44, at sheet 6.

[46]403 F. Supp. 1327 (D.C. E.D. Penn 1975), cited below as A.T. & S.F.

[47]The Commission had previously ordered the railroads to keep account of any monies they might collect under the increased rates so that refunds could be ordered if the increase were not justified. 350 I.C.C. 240-1.

[48]*A.T. & S.F., supra*, see footnote 46, at 1331.

Of course, a "keep account" provision in an order instituting investigation is also notice that refunds may follow. Once a "keep account" order is entered, the carrier is collecting monies earmarked for return should it fail to convince the Commission that the increased rates are just and reasonable.[49]

In sum, then, carriers ignore our findings that rates have not been shown just and reasonable at their own risk; for, when our order of cancellation takes effect, refunds may issue. Also, where carriers put rates into effect before we have completed our investigation, they do so at their peril. Should we later determine that those rates have not been justified, we may order refunds or direct reparations.

However, where, as in the circumstances before us, the carriers do not put their rates or charges into effect until our completed investigation has shown them not to exceed a maximum reasonable level, they should be able to rely upon that approval.

B. The massive refunds contemplated in this proceeding would have a severe effect upon certain marginal carriers,

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[49] *Aluminum Company of American* v. *Admiral-Merchants Motor Freight, Inc.*, 337 F. Supp. 674 (1972).

The Commission did issue an accounting order in the instant proceeding, but not with any view toward refunds. Rather, the order was issued so that the Commission might later determine whether it would "require that funds derived from the assessment of the considered charge, or any part thereof, be used to upgrade the fleets of the freight cars operated by respondent." 340 I.C.C. 73. Obviously such an order would not put the railroads on notice that they might be holding these monies for others.

Under the Railroad Revitialization and Regulatory Reform Act of 1976 (4R Act) an administratively final Commission decision must be rendered in 7 (or 10) months. If the Commission institutes an investigation without suspension, a keep account order must be entered. Under the statute, as amended by the 4R Act, a suspension order would not be coupled with a keep account provision.

such as the Chicago, Rock Island and Pacific Railroad Company (the Rock Island), the Chicago, Milwaukee, St. Paul and Pacific Railroad (the Milwaukee), and the Chicago and North Western Transportation company (the C&NW). Both the Rock Island and the Milwaukee are bankrupt. Yet, were we to order refunds, the Rock Island would be liable for roughly $1 million, while the Milwaukee would have to pay out well over $425,000. The C&NW would have to refund over $2 million of its quite limited financial resources.[50]

We are charged with the duty of making a "*** continuing effort to assist [the] carriers in attaining [adequate] revenue levels."[51] The ordering of refunds would cut in precisely the opposite direction. We recognize that there are many profitable roads such as the Norfolk and Western, the Union Pacific and the Burlington Northern which also collected these charges. Nevertheless, the railroads comprise a mutually dependent network, and refunds which would seriously impede several important carriers in regaining a healthy financial status could substantially affect the future rates, performance, and health of the industry.[52]

Moreover, the presence of the revenues generated by these charges may have been a factor in decisions by the carriers not to raise rates on this traffic. It may also have influenced decisions as to the amount of general rate increases sought from this Commission on the basis of revenue need. To order refund of these monies now might

[50]We have recognized that the C&NW is a marginal carrier which must carefully guard its financial strength. See *Chicago and North Western Transp. Co—Abandonment*, 354 I.C.C. 121, 126 (1977).

[51]49 U.S.C. 15(a)(4), now 49 U.S.C. 10704.

[52]*Moss, supra*, see footnote 27, at 308-9:

> The equitable aspects of refunding past rates are as inextricably entwined with the Board's normal regulatory responsibility, as such refunds may substantially affect the future rates, performance and health of the industry.

not merely return the carriers to their position before these charges went into effect, rather, it might put them significantly behind where they would have been had they not collected these charges in reliance upon our approval of them.

C. One of the purposes of the 4R Act was to encourage rate innovation and thus stimulate resourcefulness and creativity in meeting changes in intermodal competition and marketing patterns. Large amounts of refunds granted long after the carriers had relied on our judgment in collecting the charges involved could only have a chilling effect upon creative rate making. In substance, the railroads would not have been able to charge what a service was worth[53] after obtaining our approval to do so.[54] Following such an experience, carriers would naturally hesitate to creatively price their services in the future for they would constantly be faced with the threat of massive refunds if, after a period of protracted litigation, our decision approving the new rates were set aside and they were ultimately ordered canceled. Yet the carriers' prosperity is linked to their flexibility and innovation in adjusting their rates so as to obtain needed revenue while helping shippers to develop new markets for their products. We must assist the railroads to be dynamically responsive to the restlessly altering conditions of their environment. Granting reparations under the circumstances before us would inhibit the very inventiveness we wish to promote.

D. Finally, it is not at all clear that even a majority of the farmers who actually *bore* the charges would receive the reparations.

For the most part farmers sell their grain at country elevators and receive the price at the market that day less the elevator operator's commssion and the rail rate to the

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[53]See footnote 2, *supra*.

[54]See footnote 1, *supra*, and accompanying text.

market. The inspection charge is a part of that rate and would have been deducted from the price the farmer received for his grain. Once he receives payment, the farmer's transaction is complete "and he is a stranger to the subsequent transactions which result in further sale of the grain and its movement to market."[55]

Though the farmer bears the freight charges, he does not pay them to the railroads. He is neither the shipper nor the receiver on the railroad shipping documents. Refunds would be received by the shipper or receiver who paid the freight charges to the railroads, that is, by the holder of the shipping documents which, according to the Secretary of Agriculture, "would seldom if ever be the farmer who actually bore the charges."[56]

The Boards of Trade participating in this proceeding acknowledge that in all of those cases in which grain was purchased from the producer by a country elevator not operated by a cooperative there is "*** no feasible way in which it can be guaranteed that the refund will go all the way back to the producer."[57]

Even if other factors indicated that refunds might be appropriate, which they do not, we would certainly not order the railroads to pay out great sums of money which would result in windfall profits to those who did not bear the charges.[58]

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[55] Brief of the Secretary of Agriculture of the United States in response to the Commission's order of December 4, 1973. Brief filed February 4, 1974. p. 8.

[56] *Ibid.*

[57] Affidavit of Howard Stotler (p. 3) appended to the reply brief of the Boards of Trade filed December 6, 1977.

[58] The Board of Trade argue that as between the railroads and the country elevators, the latter would appear to have a better claim to the monies involved because they acted as enterpreneurs incurring the risk of loss. In fact, as outlined above, no risk was involved concerning the transit charges because, in the usual case, transportation charges were simply deducted from the purchase price. We note further that the railroads are also business enterprises and that they are facing serious losses because they relied on our judgment in collecting the charges under consideration.

In sum, the enormous refunds requested would discourage rate innovation and, by impeding the rehabilitative efforts of several major railroads, could affect the future rates, performance and health of the entire railroad industry. Nor is there any counterbalancing consideration since we have no assurance that, were we to order refunds, even a majority of those who actually bore the charges would be compensated. Accordingly, we decline to order the refunds requested and advise the District Court for the District of Kansas that it should deny the petition for refund of those monies under its jurisdiction.

Had the shippers prevailed upon the equities, further litigation would be unnecessary; refunds would issue. However, as the shippers have not been successful in this proceeding, they may, as we have previously provided, seek relief under section 13(1) (now section 11701) of the act.

ACTIONS UNDER SECTION 13(1) (NOW SECTION 11701)

With respect to further relief, we stated in our decision on remand:

[s]hould relief in addition to that which is provided in this report and order be desired by protestants, action under section 13(1) [now section 11701 of the act must be commenced.[59]

To succeed in section 13(1) (now section 11701) proceedings, shippers need not prove by cost or rate presentations that the charges in question are unreasonable. Rather, their burden will be to prove that each, individually, actually bore the charges and was damaged by that payment, i.e., that the shipper who paid the charges was not reimbursed and did not deduct the payment from monies paid to someone else (e.g., the farmer).

The parties have filed complaints, either before the

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[59] *Inspection in Transit, Grain and Grain Products*, 349 I.C.C. 89, 93 (1975).

Commission or before the United States District Court for the District of Kansas within 2 years of our finding the inspection charges not shown just and reasonable. Furthermore, the Secretary of Agriculture's petition for refunds covers all shipments to which these charges apply. Therefore, the statute of limitations [49 U.S.C. 11706, formerly 49 U.S.C. 16(3)(b)] does not bar use of the section 13(1) (now section 11701) procedure.

We have indicated why we believe that the monies held under the keep account order entered by the Supreme Court should no more be dispensed than should a blanket refund order be entered. We believe that the parties to the district court proceeding, although electing not to pursue their remedies before the Commission as requested by our order served December 4, 1973, should be placed on the same footing as all other shippers. Accordingly, our order will provide that everyone's period of refund will date from 2 years prior to the date on which the Secretary of Agriculture filed his petition for refund, unless, of course, as in the case of the Commodity Credit Corporation, an earlier filed complaint is pending. In such cases the period of recovery will be 2 years prior to the date of the filing of the complaint.

A plaintiff in a section 13(1) (now section 11701) proceeding must demonstrate:

1. That, on the equities, this situation deserves a different result from the one that we have reached in this proceeding. It may do this by demonstrating that the equities before us require another conclusion, by showing that particicular equitable considerations not called to our attention in this proceeding require the ordering of refunds, or by establishing that the reasoning applied in the instant proceeding does not apply to its situation and that, in its individual circumstances, it would be unfair for the carrier to keep the money; and

2. That, if refunds are ordered, they will only go, in full, to those who have actually borne the charge.

On all of these issues the complainant shall have the burden of proof. All complaints filed under section 13(1) (now section 11701) must be accompanied by a statement similar in nature to that which would be filed under rule 95 of the Commission's Rules of Practice, 49 CFR 1100.95, setting forth, for each defendant railroad, the details of the movements for which the charges complained of were assessed.

It is ordered:

1. That the Secretary of Agriculture's petition for refunds is denied;

2. That the District Court for the District of Kansas be advised not to refund those monies under its jurisdiction;

3. That this proceeding is discontinued;

By the Commission, Chairman O'Neal, Vice Chairman Brown, Commissioners Staffort, Gresham, Clapp, and Christian. Vice Chairman Brown absent and not participating.

APPENDIX (ii) (h)

No. 76-1503. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. v. WICHITA BOARD OF TRADE ET AL. Appeal from D.C. Kan. Judgment vacated and case remanded with directions to remand case to the Interstate Commerce Commission for further consideration in connection with its reconsideration of *Secretary of Agriculture* v. *Interstate Commerce Commission*, No. 76-1026 (CADC Mar. 11, 1977), on remand from the United States Court of Appeals for the District of Columbia Circuit. MR. JUSTICE POWELL took no part in the consideration or decision of this appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

THE WICHITA BOARD OF TRADE, et al., *Plaintiffs,*	)	
vs.	)	
THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.*	)	Civil Action No. W-4730

ORDER OF REMAND TO THE INTERSTATE COMMERCE COMMISSION

NOW on this 31st day of July, 1973, in accordance with the opinion of the Supreme Court of the United States in Docket Nos. 72-214 and 72-433 decided on the 18th day of June, 1973, and in accordance with the judgment of the Supreme Court of the United States entered on June 13, 1973, this Court sets aside its opinion entered on May 24, 1972, and the judgment of this Court entered on the 8th day of June, 1972, and hereby remands the above-entitled matter to the Interstate Commerce Commission for further proceedings consistent with the said opinion of the Supreme Court of the United States.

IT IS SO ORDERED.

/s/ JAMES E. BARRETT

James E. Barrett
United States Circuit Judge

/s/ FRANK G. THEIS

Frank G. Theis
United States District Judge

/s/ EARL E. O'CONNOR

Earl E. O'Connor

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

THE WICHITA BOARD OF TRADE, et al.,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, et al.,
Defendants.

Civil Action No. W-4730

OPINION OF THE COURT SUSTAINING PLAINTIFF'S MOTION FOR REFUND

Before BARRETT, Circuit Judge, THEIS and O'CONNOR, United States District Judges.

THEIS, District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

THE WICHITA BOARD OF TRADE, et al, *Plaintiffs,*	
vs.	Civil Action No. W-4730
THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, et al, *Defendants.*	

OPINIONS OF THE COURT SUSTAINING PLAINTIFFS' MOTION FOR REFUND

This case and its subject matter, again before the Court, are venerable with age but not expedition, covering a time span from 1971. This litigation resulted from an Order of the Interstate Commission (hereinafter referred to as "ICC"), approving as just, reasonable and lawful proposed new or increased charges for the first inspection of grain and grain products at various points in the Western District of the United States. Shippers who had objected to the proposed new charges before the ICC sought review of the order in this entitled case, and a statutory three-judge district court was convened. An opinion was rendered May

26, 1972, cited as *Wichita Board of Trade v. United States*, 352 F. Supp. 365, to which reference is made as the initial phase of this litigation. In this opinion, this three-judge court set aside the ICC order as invalid, remanded the matter back to the ICC for further proceedings, and ordered that the proposed charges be suspended until further order of the Court.

The interventing railroads appealed to the United States Supreme Court, sought and were granted a stay of that part of the Court's judgment suspending collection of the questioned rate, subject to the following conditions:

> "(2) That, as a condition of the foregoing stay, each railroad collecting in-transit grain inspection charges under the challenged tariffs shall immediately take steps, including publication of appropriate provisions in applicable tariffs, to do the following:
>
> (a) keep accurate accounts in detail of all amounts hereafter received during the existence of the stay by reason of in-transit grain inspection charges, specifying by whom and in whose behalf such amounts are paid; and
>
> (b) In the event the order suspending the charges is affirmed by this Court, refund (with interest), of such amounts to persons in whose behalf such amounts were paid, without the necissity for such persons to make applications for refunds.
>
> "In the event this Court's action should be other than an affirmance of the results reached by the district court, this Court may make such further order concerning the disposition of the aforesaid amounts as the Court may determine."

On June 18, 1973, the Supreme Court handed down its opinion affirming this Court's decision on the merits but holding that the entry by this Court of the injunction

suspending the application of the rate was error, cited as the *A. T. & A. F. R. R. Co. v. Wichita Board of Trade*, 412 U.S. 800, 37 L. Ed. 2d 350, 93 S. Ct. 2367. The opinion further directs this Court to handle the refunds by the following footnote:

> "We have previously stayed the judgment of the District Court on condition that appellant railroads keep account of the amounts received from in transit charges, 409 U.S. 801 (1972). We hereby direct the District Court to enter an order, consistent with this opinion, regarding the disposition of those amounts."

In accordance with Supreme Court mandate, by order filed August 13, 1973, this Court remanded the matter to the ICC for further proceedings consistent with the opinion of the Supreme Court. No order was then entered by the Court regarding the distribution of the amounts received by the railroads by reason of their collection of the in-transit grain inspection charges during the existence of the stay, for the obvious reason further administrative action by way of reconsideration of the justness and reasonableness of the proposed rates was directed by both this Court and the Supreme Court.

By Report and Order served January 27, 1975, the ICC found that the proposed charges for the first stop for in-transit inspection of grain in the Western District had not been shown to be just and reasonable and ordered them cancelled. A petition for reconsideration filed by the railroads was denied by order served June 5, 1975, and there are no further proceedings pending before the Commission.

The prayer of the pending motion is to the effect that "the time has now ripened for refunds to the shipping public" composed of plaintiff and assignors, farmers, country elevators, large terminals, i.e., the grain trade. It is further prayed that "the amounts received by the railroads pursuant to the stay order equitably belong to the persons in whose behalf such amounts were paid and an order should be

entered requiring them to refund such amounts with interest.

Again, as with every phase of this litigation, extensive briefs have been filed with the Court and protracted arguments made by learned counsel in competent adversarial demeanor. The subject matter of the litigation has now been simply reduced to that of MONEY – a reputed fund of approximately three million dollars to be determined by the accounting here sought. The groups of adversaries, as always, are the plaintiffs representing the grain trade as shippers, and the defendants representing the western railroads as the carriers.

The position of the defendant railroads before this Court is that they should keep this fund of money, should not have to account for it or pay it back to those from whom it was exacted.

THE THREE JUDGE COURT ISSUE

Initially, the question is raised by both sets of parties as to whether at this point this case remains a three-judge court case, or has become a one judge court case before the judge to whom it was originally assigned. Our posture as to this question is that it matters little to the sound jurisdictional basis of the case. However, the three judges are unanimously agreed that the best administration of justice requires at this stage, i.e., for determination and ruling upon the question of refunds jurisdictionally, that this court will remain a three judge court. Several very good reasons for such action appeal to us. Again, as will be commented upon later in the opinion, defendants raised questions of so-called "jurisdictional" right for any Article III Court, regardless of how numerically constituted to rule on the legality of refunds from the fund accumulated under the stay order. They make the following assertions of lack of judicial power in this Court, viz.:

> 1. The wording of the Supreme Court's opinion constitutes a *res judicata* basis against requiring their disgorgement;

2. Congressional statutory provision, *stare decisis* by federal court decisions and by ICC's own self-serving decision of reserved power in them preclude us; and

3. Any action by us would be collateral attack on an ICC administrative decision.

While, as will be noted, we consider all of the defendants' assertions spurious and completely lacking in legal efficacy, where both Supreme Court intent and jurisdictional thrusts are involved, the shortest and best road back to the Supreme Court is via the three judge method as it existed prior to the recent congressional amendments deleting three-judge jurisdiction over ICC rulings.

The most illogical assertion defendants make is their statement that the ICC decision denying the ultimate validity of the proposed in-transit inspection rate was on the basis that the railroads failed to meet their burden of proof in a Section 15(7) action of making an affirmative showing of "justness and reasonableness," and their corollary contention that this is not the equivalent legally of a finding of unjustnes and unreasonableness. Their implication is that some "never-never-land" exists between "reasonable" and "unreasonable." We have carefully examined the cases cited and the language of Justice Marshall in this case, finding nothing to foundation such a ludicrous legal monstrosity. As a matter of fact, it is assertions by lawyers of such illogic positions which are rapidly undermining public respect for the Bar, along with public delusionment after Watergate. We do not believe it possible to articulate an understandable distinction -- lay or legal -- between "not just and reasonable" and "unjust and unreasonable."

This contention is then the premise by which counsel for defendant railroads reinvoke the doctrine of

primary jurisdiction in the ICC and argue that single payors of their invalid charge have only two administrative remedies before the ICC to seek to recover a payment, i.e., under either a Section 15(7) proceeding where the ICC contends and has held a refund is discretionary, or a Section 13(1) proceeding for reparation where an applicant would have the affirmative burden of showing the charge "unjust and unreasonable." Moreover, we are informed this generous invitation by the railroads for "reparation" under 13(1) is not ony difficult and expensive for small shippers, but would be barred now as to any payor in this case during the stay period by a statutory limitation of action.

Defendants further assert their legal position is bolstered by two ICC actions relating to aspects of this case which would in effect make an affirmative refund by this Court to be "collateral attack" on ICC interpretation of its own power. First, they point to some language at page 93 of the ICC final opinion finding these rates not proved "just and reasonable," concerning the 15(7) and 13(1) remedies. They misread the ICC, for it is neither claimed there that such remedies are exclusive nor that what was said applied to funds collected furing the stay order. Actually, it is our opinion the ICC reference to 15(7) and 13(1) remedies was a general statement about remedial collection during an entire period for which rates had been in effect, and where such rates were found later by ICC to have been invalid. Second, they infer that the action of the Secretary of Agricluture in applying to ICC for refund of Commodity Credit Corporation payment of these illegal in-transit charges and its turn-down by ICC, is some kind of precedential decision authoritative with us despite a pending appeal on its particular validity in the D.C. Circuit. We reject both assertions.

MEANING OF THE MARSHALL OPINION IN THE SUPREME COURT DECISION

The sound basis of our present decision is our reliance on and reading of the plurality decision of Justice Marshall and the clear guidelines, as well as implications therefrom, directing judicial decision on refunds. Certainly, Justice Marshall's opinion delineates the scope of administrative review by the judiciary, sets forth the administrative agency options in carrying out congressional policy, sets out the criteria a court must and/or should consider, and how to weigh such criteria. The Marshall plurality squarely affirms the District Court in its reason for holding invalid the ICC action, it squarely affirmed the District Court in its action of remand to ICC for further administrative action in accordance with its expertise for determining the public interest and shipper-transportation interest in rates and modes of movement of goods and people in interstate commerce.

Justice Marshall's language at various places indicates to us there is no middle gound between "reasonable" and "unreasonable." Witness the statment on page 816 of the U.S. Reporter:

> "But it might be that rates for services including an in-transit inspection at the level of the general maximum, would be *reasonable* while rates for services without such inspection would be *unreasonable* at that level, or even below it." (Emphasis added.)
>
> And at the top of page 819:
>
> "Carriers may put into effect any rate that the Commission has not declared unreasonable."

It is to be noted that in its order ending its reconsideration on remand from this Court and the supreme Court, the ICC said:

> "That as the proposed new charges for the first stop for the in-transit inspection of grain at various points in the

> United States outside the eastern territory are not shown to be just and reasonable and otherwise lawful, the respondents herein be notified and required to cancel the applicable schedules.... And ... that this proceeding be and is hereby discontinued."

Reflecting the validity of Justice Marshall's statement forbidding unreasonable rates, these rates were cancelled by the ICC and withdrawn by the railroads. Nowhere can the Court find either judicial or lay discussion pointing to or approving a lexicographic legerdemain which distinguishes "not just and reasonable" from "unjust and unreasonable."

We now turn our attention to the bulwark of our judicial authority to direct the question of refund. This we find in the unadorned language of the Supreme Court in both its stay order and its principal decision, and which is quoted verbatim at pp. 1 and 2 of this opinion. We also find it inherent in the powers of the federal judiciary under classic equitable principles, as well as the express statutory injunctive authority (28 U.S.C. §2324) which the Supreme Court noted but determined to have been erroneously applied by this Court's suspension of rates. The distinction made in the Marshall opinion was to the effect that while the statutory power existed to stay the rate pending final judicial determination under the equitable guidelines necessary in this factual situation, it was error to suspend the rates in review of a Section 15(7) proceeding where the Court remands the proceeding to the ICC to correct and explain its decision, and under which the railroads were entitled to charge the rates until found not just and reasonable, and hence unlawful.

The Supreme Court's enunciation of the equity powers of the District Court and its evaluation of how such powers should have been exercised are lucidly found in Part III of the Marshall opinion. These excerpts at pp. 819-20 (with citations omitted for brevity), are repeated for emphasis.

"the power conferred on the District Court by §2324 does not in itself include a power to enjoin the railroads from implementing a proposed new charge. Rather, that power must be considered as at best ancillary to the general equitable powers of the reviewing court, and protective of its jurisdiction.

. . .

"Such a power must be inferred from Congress' decision to permit judicial review of the agency action. 'If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made.'

"Yet it would be surprising if that power could be exercised to the extent that it might substantially interfere with the function of the administrative agency. 'The existence of power in a reviewing court to stay enforcement of an administrative order does not mean, of course, that its exercise should be without regard to the division of function which the legislature has made between the administrative body and the court of review.' Proper regard for that division of function requires that we hold erroneous the District court's decision to enjoin not only the Commission's order finding the proposed rates just and reasonable but also the implementation of those rates.

. . .

"The terms of §15(7) do not specifically govern this situation. [Court's note: Obviously 'this situation' in the context of the Supreme Court opinion refers to what procedural event in the rate making process occurs when a court finds ICC action to have been unlawful.] Nor is there any other provision in the relevant statutes depriving federal courts of their general equitable power to preserve the status quo to avoid irreparable harm pending review."

These lengthy quotations of Supreme Court affirmance of judicial equitable powers both at trial and appellate levels, as previously stated, are here set forth to illuminate judicial power to protect from irreparable harm.

As stated, one method of protecting from irreparable harm is to insure the status quo by a stay order of the contemplated unlawful action. Another classic method is to require the action party, i.e., the party proposing the doing of an action, to post a surety bond securing the party whom the action offends from financial damage. Other effective methods where financial stability of the action party is established may be requirement for keeping disputed funds collected to be held in trust accounts or to require the keeping of detailed accounts and records of the amounts charged or collected from the challenged action. All of these methods of insuring the accuracy and integrity of the fund are methods of insuring the accuracy and integrity of the fund are open to a court of equity. They might have been employed by this Court. The supreme Court chose to employ the self-accounting method by the action party railroads as a condition to lifting this Court's stay order. In so doing,the Supreme court, in its stay order (409 U.S. 801, 93 S. Ct. 24, 34 L. Ed. 2d. 14 (1972), and in footnote 1 of its principal opinion, made three simple and unequivocal statements:

> "1. Keep accurate accounts in detail of all amounts paid, by whom and for whom;
>
> 2. If the challenged payments are ultimately found to be unlawful either as a result of direct court judgment or by an administrative agency acting in accordance with or direction of a court judgment, then the payors of such illegally exacted amounts, or their beneficiaries in interest, shall have refunds;
>
> 3. The District Court [this Court] shall enter an order, consistent with the Supreme Court opinion, regarding disposition of these amounts."

We rely additionally, as persuasive judicial precedent, upon *United States v. Morgan*, 307 U.S. 183, 83 L. Ed. 1211, 59 S. Ct. 795 (1939); *Atlantic Coast Line R. Co. v. State of Florida*, 295 U.S. 301, 79 L. Ed. 1451, 55 S. Ct. 713 (1935); *Inland Steel co. v. United States*, 306 U.S. 153, 83 L. Ed. 557, 59 S. Ct. 415 (1939).

The defendant railroads finally contend that even though this Court has the jurisdictional power to direct entitlement of the fund, our equitable disposition should be in their favor. Despite original protestation by the carriers at the original district court hearing that they had no real interest in the money from such increased charge, but only sought the public interest in facilitation of freight shipments by rail and an increased supply of box cars, these railroads now say they have grown attached to the money to such an extent it may be a hardship to disgorge it, and hence inequitable for them to be required to made refund. They further argue that choice of disposition of the fund lies between only the big -- the railroads -- vis-a-vis the grain trade. They point out that whereas the exaction of the unlawful charges was initially from farmers as the grain producers, and/or the small elevators where the grain was delivered by the farmers, by means of deductions made from sale proceeds, these charges were passed along and ultimately paid for record keeping purposes in the grain trade by the large corporate terminal elevators or Boards of Trade.

Thus, wittingly or unwittingly, the railroads focus on an equitable principle as a justification against their disgorgement, that is, the principle of unjust enrichment which they are "concerned" will occur in the grain trade at the expense of the farmers and country elevators.

Plaintiffs have responded in final briefs to this argument and to previous inquiry by the judges of this Court as to the minuteness of record keeping and accounts in the grain trade by informing the Court that in most instances payments of the illegal in transit charges are traceable to the

local levels for purposes of accurate restitution. Again, however, the mechanics of disposition and enforcement would be a matter of future concern for this Court or a judge of this Court.

However, it is the principle of unjust enrichment, coupled with the keystone of the law -- righting a wrong -- which commands the judgment of this Court in favor of plaintiffs and against defendants.

JUDGMENT AND ORDER OF THE COURT

In accord with the foregoing opinion, the Court enters judgment for plaintiffs sustaining their "Motion for Refund," and the following orders in implementation and effectuation of said judgment, viz:

IT IS ORDERED that each defendant railroad, within sixty (60) days of this date, file with the Clerk of this court at Wichita, Kansas, written accounting of the in-transit charges collected during the stay period, and tender therewith into the registry of the Court the amount of money collected by each said railroad from such charges.

IT IS FURTHER ORDERED that each plaintiff shall within ninety (90) days of this date file a written statement of the amounts paid by it as in-transit charges during such stay period, detailing whether such payment was one directly orginating with it or on whose behalf the payment was made, it being the intention of the Court to have identified for ultimate refund or reimbursement to the actual payors of such in-transit charges at the farmer and/or country elevator levels.

IT IS FURTHER ORDERED that his cause and any legal issues arising further therefrom be transferred to the sole judicial supervision of the Honorable Frank G. Theis, United States District Judge, sitting at Wichita, Kansas, and for any further judicial orders or proceedings found by him to be necessary.

At Wichita, Kansas, this 23rd day of February, 1977.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

THE WICHITA BOARD OF TRADE, et al., *Plaintiffs,*	)	
vs.	)	
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,	)	Civil Action No. W-4730
Defendants.	)	

ORDER

In accordance and compliance with the judgment and order of the Supreme Court of the United States, in Case No. 76-1503, The Atchison, Topeka and Santa Fe Railway Company, et al. Appellants, v. The Wichita Board of Trade, et al, Appellees, dated June 27, 1977, and received by the Clerk of the Court on July 29, 1977, the above entitled cause is hereby remanded to the Interstate Commerce Commission for further consideration of the issues of fact and law involved therein in connection with its reconsideration of the case of Secretary of Agriculture v.

Interstate Commerce Commission, No. 76-1026 (CADC March 11, 1977).

IT IS SO ORDERED.

At Wichita, Kansas, this 22nd day of August, 1977.

Chief Judge

FILED
AUG. 23 1977
ARTHUR G. JOHNSON, Clerk
By _____Deputy

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

MAY TERMS - JUNE 16, 1983

Before Honorable Oliver Seth, Honorable Jean S. Breitenstein, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Court Judges.

THE WICHITA BOARD OF TRADE, et al.,	)	
Plaintiffs-Appellees,	)	No. 82-1808
vs.	)	
THE UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, and	)	
ATCHISON, TOPEKA and SANTA FE RAILWAY COMPANY, et al.,	)	
Intervening Defendants-Appellants.	)	

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing in banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and

submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

HOWARD K. PHILLIPS, Clerk

By Robert L. Hoecker
Chief Deputy Clerk

Service Date Nov. 20, 1975

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 12th day of November, 1975.

INVESTIGATION AND SUSPENSION
DOCKET NO. 8548
INSPECTION IN TRANSIT, GRAIN AND GRAIN PRODUCTS

Upon consideration of the record in the above entitled procceding, including the report and order of the Commission on further reconsideration servied January 27, 1975, the motion filed September 5, 1975, by a protestant, the United States Department of Agriculture, for a refund order under section 15 (7) of the Interstate Commerce Act and for other and further relief, the reply filed September 22, 1975, by the respondent railroads directed against the motion, and the reply filed jointly on September 25, 1975, by National Grain & Feed Dealers association, Saint Joseph Grain Exchange, Merchants' Exchange of St. Louis, and Sious city Grain Exchange in support of the motion;

It is ordered, that the motion be, and it is hereby, denied for the reason that sufficient grounds have not been presented to warrant granting the action sought.

By the Commission.

ROBERT L. OSWALD
Secretary

(SEAL)

. . . . . .

VICE CHAIRMAN O'NEAL, concurring in the result:

I approve the result reached by the majority's order.

However, the conclusory language of the order states no rationale for the commission's decision. The decision as to whether or not to grant the relief sought involves an exercise of the Commission's discretion. Given the significance of the proceeding the Commission owes the parties and the public an explanation of its-action. Since the majority has limited its discussion to the language of the order, I am separately stating the basis for my vote.

Reparations under section 13 (1) rather than refunds under section 15 (7) are the appropriate means of redress for the petitioners in this proceeding. The Commission initially found the new, separate in-transit inspection charges for grain to be lawful, and the carriers collected the separate charges in reliance upon that finding. Even after the Supreme Court upheld the decision of the three-judge District Court setting aside the Commission's decision, the carriers could not conclude that the Commission on remand would find that the separate charges were not shown to be just and reasonable. The basis of the remand was that the Commission failed to explain its departure from prior norms. The Court left open the possibility that the Commission could repudiate those norms. On remand, the Commisssion reopened the proceeding and asked for briefs directed to obtaining comments on the Commission's proposed course of action. The order enumerated five alternative courses of action; two of them would have involved findings that the in transit charges were just and reasonable.

A majority of the Commission found that the in-transit charges were not shown to be just and reasonable and this reversal of the commission's prior position was made known to the public when the Commission issued its report on

remand on January 21, 1975.

Consideration must be given to the impact which a refund order in these circumstances would have on proposals for new rates and charges. The commission's approval of a new rate or charge would provide scant comfort to carriers faced with the threat of being forced to refund all revenues collected under the rate or charge during a protracted period of litigation if a court set the Commission's decision aside and the rates were ultimately cancelled. Such a precedent would greatly inhibit ratemaking innovation by the carriers. Carriers should not be deterred from seeking changes in the pricing of their services to reflect the changing market for railroad transportation.

SECRETARY OF AGRICULTURE OF the UNITED STATES, Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and United States of America, Respondents,

Western Railroads et al, Intervenors.
No. 76-1026.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 17, 1977.
Decided March 11, 1977.

Before BAZELON, Chief Judge, TAMM and MacKINON, Circuit Judges.

PER CURIAM.

By decision of January 21, 1975, the Interstate Commerce Commission determined that certain railroads had failed to demonstrate that separate charges for in individual in transit grain inspections were "just and reasonable" under 49 U.S.C. § 15(7). 349 I.C.C. 89.[1] The tariffs were ordered

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[1]Prior to initiating the charges in question, a portion of the line-haul rates for grain shipments reflected in-transit inspections. In order to deter such inspections, the railroads added the individual charges to the line-haul rate. A division of the Commission initially determined that the railroads had demonstrated the propriety of the separate charges, and permitted their implementation. 339 I.C.C. 364 (1971). Following approval by the entire Commission, 340 I.C.C. 69 (1971), this decision was overturned by the United States District Court for the District of Kansas, *Wichita Board of Trade v. United States*, 352 F. Supp. 365 (D.C. Kan. 1972). On appeal to the Supreme Court, the district court's decision was affirmed as to the remand to the Commission but an injunction against continued collection of the charges was reversed. *Atchison T. & S.F. Ry. Co. v. Wichita Board of Trade*, 412 U.S. 800, 93 S. Ct. 2367, 37 L.E.2d 350 (1973). It was only on remand from the Supreme Court that the Commission found the charges in question to be unjustified. For a fuller description of the history of this case, *see id.* at 803-806, 93 S.Ct. 2367.

cancelled within 60 days, id. at 100. At that time, no party had requested that a general refund order be issued and the Commission merely noted that individual aggrieved parties could seek refunds under 49 U.S.C. § 13(1)[2] On September 5, 1975, the Secretary of Agriculture, acting in his statutory capacity as representative of farm interests[3], moved the I.C.C. to issue a general refund order under 49 U.S.C.§ 15(7). That section provides, in pertinent part, that the Commission "may ... require ... carriers to refund .... such portion of such increased rates or charges as by its decision shall be found not justified." The Commission summarily denied the Secratry's request, simply noting that "sufficient grounds have not been presented to warrant granting the action sought." Docket No. 8548 (Nov. 12, 1975). Vice Chairman O'Neal concurred in the result but objected that "the order states no rationale for the Commission's decision." *Id.* The Secretary appealed.

At the outset, the Secretary contends that the refund provision of § 15(7) is mandatory rather than discretionary. He contends that "may order" a refund should be construed as "shall order." Although "may" has on occasion been read as "shall," neither the cases cited[4] nor the legislative history presented by the Secretary[5] support such a reading in this

[2]Unlike § 15(7), § 13(1) does not appear to contain a burden of proof favorable to shippers. Section 13(1) authorizes a party aggrieved by a railroad to petition the Commission for aid in redressing the grievance. The Commission is to forward the complaint to the offending railroad to satisfy or answer. The Commission is authorized to investigate complaints that are not voluntarily satisfied. The section does not expressly authorize the Commission to order relief if an unsatisfied complaint is well-founded.

[3]*See* 7 U.S.C. §§ 1291(a) and (b); and 7 U.S.C. § *1622(j). The authority of the Secretary to petition the I.C.C. for the refund order and to pursue this appeal is not challenged.*

[4]*See Thompson v. Clifford,* 132 U.S. App. D.C. 351, 408 F.2d 154 (1968); *Wilson v. United States,* 135 F.2d 1005 (3rd Cir. 1943).

[5]At oral argument, cousel for the Secretary admitted that the legislative history on this point was sparse.

case. In fact, the Supreme Court has recognized that the Commission's authority to order a refund under § 15(7) is discretionary. *Atchison T. & S.F. Ry Co. v. Wichita Board, supra* note 1, 412 U.S. at 817-826-, esp. at 824, 93 S. Ct. 2367.[6] There is no reason to believe that use of a discretionary word was inadvertent. Since § 15(7) contains "shall" six times and "may" five times, Congress appears to have deliberately distinguished mandatory and discretionary duties.

The passage of § 202(e) (2) (8) (e) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No 94-210, 90 Stat. 31 (Feb. 5, 1976), does not eliminate the Commission's discretion in this case even if, as the Secretary contends, it was intended to apply retroactively. That statute mandates the refund of rates found to be unjustified only when the Commission has not suspended their collection pending the hearing on their legality. The Commission suspended collection of the individual inspection charge prior to the initial determination of reasonableness, but permitted their collection during judicial review. I & S Docket No. 8548, 339, I.C.C. 364 (1971). The statute does not cover this situation.

Nevertheless, the Commission's refusal to issue a refund order cannot be affirmed on this record for the Commission has given no reasons for its decision. *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947); *Atchison Ry. v. Wichita Board*, 412 U.S. at

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[6] The Commission, relying on the portions of the *Wichita Board* cited in text, asserts that relief under Section 15(7) is "by law committed to agency discretion" and therefore immune from review. I.C.C. Br. at 19. Nothing in the Court's option holding that the district court's injunction interfered with the Commission's primary jurisdiction to balance competing policies supports this conclusion. In fact, at various points the Court referred to judicial review of the Commission's eventual decision, *e. g.*, 412 U.S. at 825, 93 S.Ct. 2367, and its holding in part II of its opinion presupposed judicial review (remand appropriate when Commission fails to spell out its reasons for approving rates with sufficient clarity to permit judicial review).

807, 93 S. Ct. 2367 (Citing cases). Counsel for the Commission and for the intervening railroads have offered several explanations for the Commission's decision. But "[a]n administrative order can be affirmed on appeal only on the grounds on which the Commission relied." *KIRO, Inc. v. FCC*, 178 U.S. App. D.C. 126, 545 F. 2d 204 (1976). There can be no assurance that the reasons suggested by counsel were in fact those of the Commission. *Wichita Board*, 412 U.S. at 807, 93 S.Ct. 2367. (citing cases).

Consequently, a remand is necessary for the Commission to reconsider the Secretary's request and announce its eventual decision in a reasoned opinion. The Commission must give the question a "hard look" and explain how it has balanced any competing factors. *Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. 383, 393, 444 F. 2d 842 (1971). In this connection, if the Commission decides not to issue a refund order but to allow individual petitioners to proceed under § 13(1), it should spell out what will be required for relief under § 13(1). Will each shipper be required to demonstrate, contrary to the presumption of § 15(7), that separate charges for in transit grain inspections are unreasonable? Or will the only question be whether and in what amount each shipper was damaged and evaluation of equitable defenses, if any are to be permitted presented by the offending railroad? Consideration of such questions are essential to a reasoned decision and effective judicial review.

At oral argument we were informed that currently filed § 13(1) actions are being held in abeyance pending the resolution of this appeal. Presumably it will be necessary for these cases to remain in limbo since we have not passed on the merits of the Commission's decision. Consequently, we urge the Commission to reach a decision on this remand with dispatch so that the controversy over these tariffs, now into its sixth year, can quickly come to an end.

Record remanded for further proceedings consistent with this opinion.

49 § 1, par. (5). **Just and reasonable charges.**

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

49 § 8. Liability in damages to persons injured by violation of law.

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

49§ 11705 Rights and remedies of persons injured by certain carriers.

(b) (2) A common carrier providing transportation subject to the jurisdiction of the Commssion under subchapter I or III of chapter 105 of this title is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this subtitle.

49 § 9. Remedies of persons damaged; election; witnesses

Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provision of this

chapter in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

49 § 11705 Rights and Remedies of persons injured by certain carriers.

(c)(1) A person may file a complaint with the Commission under section 11701(b) of this title or bring a civil action under subsection (b)(1) or (2) of this section to enforce liability against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title. A person may begin a proceeding under section 10704 or 10705 of this title to enforce liability under subsection (b)(3) of this section by filing a complaint with the Commission under section 11701(b) of this title.

49 § 13, par. (1). Complaint to commission of violation of law by carrier; reparation; investigation.

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization or any body politic or municipal organization, or any comon carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions

thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of laws thus complained of. If such carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

49 § par. (7). Commission to determine lawfulness of new rates; suspension; refunds.

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new indivisual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing.

whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

49 § 16, par. (1). Award of damages.

If, after hearing on a complaint made as provided in section 13 of this title, the Commission shall determine that any party complainant is entitled to an award of damages under the provision of this chapter for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.